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Cause No. 81-384

Supreme Court of the United States

OCTOBER TERM, 1981

THE STATE FAIR OF TEXAS,
and STECK & STAPF ATTRACTIONS, INC.,
Petitioners

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR CERTIORARI

JEFFREY S. LYNCH
GERALD R. POWELL
of
Vial, Hamilton, Koch, Tubb, Knox & Stradley
1500 Republic Bank Tower
Dallas, Texas 75201
(214) 748-4541

ALFRED W. ELLIS
of
Woodruff & Ellis
2322 Republic Bank Tower
Dallas, Texas 75201
(214) 747-9061

Attorneys for Petitioner,
Steck and Stapf Attractions, Inc.

QUESTIONS PRESENTED

1. Whether an aerial tramway, used to transport passengers across the grounds of the State Fair of Texas, is a "consumer product" within the meaning of 15 U.S.C. §2052 (a)(1), so as to authorize assertion of jurisdiction over the tramway by the Consumer Product Safety Commission.

2. Whether the grounds of the State Fair of Texas constitute an area or establishment where aerial tramways are manufactured, within the meaning of 15 U.S.C. §2065 (a)(2), so as to authorize inspection by the Consumer Product Safety Commission.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Fifth Circuit were:

THE STATE FAIR OF TEXAS
STECK AND STAPF ATTRACTIONS, INC.
UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION

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OPINIONS BELOW

The opinion of the United States District Court is reported at 481 F.Supp. 1070 (N.D. Tex. 1979). See Appendix "A". The opinion of the United States Court of Appeals, Fifth Circuit, No. 80-1006, slip op. at 9292 (5th Cir. June 10,1981), is not yet reported. See Appendix "B".

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1981. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves two provisions of the Consumer Product Safety Act, 15 U.S.C. §2051 *et. seq.* The first question presented concerns the following provision:

§2052. **Definitions**

(a) For purposes of this chapter:

(1) The term "consumer product" means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; but such term does not include —

(A) Any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer,

(B) tobacco and tobacco products,

(C) motor vehicles or motor vehicle equipment (as defined by sections 1391(3) and (4) of this title),

(D) pesticides (as defined by the Federal Insecticide, Fungicide, and Rodenticide Act),

(E) any article which, if sold by the manufacturer, producer, or importer, would be subject to the tax imposed by section 4181 of Title 26 (determined without regard to any exemptions from such tax provided by section 4182 or 4221, or any other provision of Title 26), or any component of any such article,

(F) aircraft, aircraft engines, propellers, or appliances (as defined in section 1301 of Title 49),

(G) boats which could be subjected to safety regulation under the Federal Boat Safety Act of 1971; vessels, and appurtenances to vessels (other than such boats), which could be subjected to safety regulation under title 52 of the Revised Statutes or other marine safety statutes administered by the department in which the Coast Guard is operating; and equipment (including associated equipment, as defined in section 1452(8) of Title 46) to the extent that a risk of injury associated with the use of such equipment on boats or vessels could be eliminated or reduced by actions taken under any statute referred to in this subparagraph,

(H) drugs, devices, or cosmetics (as such terms are defined in sections 321(g), (h), and (i) of Title 21), or

(I) food. The term "food", as used in this subparagraph means all "food", as defined in section 321(f) of Title 21, including poultry and poultry products (as defined in section 453(e) and (f) of Title 21), meat, meat food products (as defined in section 601(j) of Title 21), and eggs and egg products (as defined in section 1033 of Title 21).

The second question presented concerns the following provision:

§2065. Inspection and Recordkeeping

(a) For purposes of implementing this chapter, or rules or orders prescribed under this chapter, officers or em-

ployees duly designated by the Commission, upon presenting appropriate credentials and a written notice from the Commission to the owner, operator, or agent in charge, are authorized —

(1) to enter, at reasonable times, (A) any factory, warehouse, or establishment in which consumer products are manufactured or held, in connection with distribution in commerce, or (B) any conveyance being used to transport consumer products in connection with distribution in commerce; and

(2) to inspect, at reasonable times and in a reasonable manner such conveyance or those areas of such factory, warehouse, or establishment where such products are manufactured, held, or transported and which may relate to the safety of such products. Each such inspection shall be commenced and completed with reasonable promptness.

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UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION,
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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Steck and Stapf is the operator of an aerial tramway, known as a "Swiss Skyride," on the premises of the State Fair of Texas in Dallas. The tramway transports fair patrons between the main entrance and the midway, a dis-

tance of approximately one-half mile. It follows a course which is immediately above the main walkway from the entrance to the amusement area. This allows patrons to bypass those areas congested with people and concessions.

Von Roll, Ltd., a Swiss corporation, custom designed, manufactured, and installed the aerial tramway. Rogers-Gulledge, Inc. owned the tramway prior to its purchase by State Fair in the early 1970's. Steck and Stapf is a licensee of the State Fair, responsible for operating and maintaining the tramway. The City of Dallas owns the land on which the tramway is located, and has contracted with The State Fair, a private non-profit Texas corporation, to operate the State Fair of Texas.

The tramway was involved in an accident during the final days of the 1979 Texas State Fair. On October 21, 1979, several gondolas fell to the ground, resulting in one death and several injuries. Damage suits naming the State Fair of Texas as defendant were immediately filed and protective orders prohibiting tampering with the tramway were entered. The United States Consumer Product Safety Commission attempted, without a warrant, to enter and inspect Steck and Stapf's premises and tramway on October 26, 1979. This suit was initiated by Steck and Stapf to restrain the Commission from entering and inspecting the premises. The suit also sought a declaratory judgment that the tramway was not a "consumer product," and that the premises were not subject to inspection under the Consumer Product Safety Act. An identical suit was initiated by the State Fair. On November 3, 1979 the United States District Court denied a preliminary injunction sought by the State Fair, ruling that no irreparable injury was present since the State Fair could deny permission for the warrantless search sought by the Commission. The Court retained jurisdiction anticipating that a warrant for inspection would be sought.

On November 5, 1979 the Commission obtained an *ex parte* administrative inspection warrant from the United States Magistrate which would allow the Commission to inspect records and tramway components in the possession of Steck and Stapf. The State Fair refused to allow the inspection and moved to have the warrant quashed.

The Motion to quash the warrant, the suit filed by Steck and Stapf and the suit filed by State Fair were consolidated into one action. On November 13, 1979, the trial court found that the tramway was a "consumer product" but that no showing had been made to support the Commission's assertion of authority to inspect the premises.

All parties appealed from the district court judgment. On June 30, 1981 the Fifth Circuit Court of Appeals held that the tramway was a "consumer product" and that the State Fair premises constituted an area where the tramway was manufactured so as to authorize on-site inspection. Justice Ainsworth dissented from the holding that the tramway was a "consumer product."

ARGUMENT

I. An aerial tramway is not a "consumer product."

This lawsuit embraces one paramount issue — should a federal agency have jurisdiction to regulate amusement rides in state or local theme parks? Unless an aerial tramway is a "consumer product" within the meaning of the Consumer Product Safety Act, 15 U.S.C. §2052(a)(1), the agency has no jurisdiction. Six different courts have sought revelation in the wording of the statute itself; yet, no consistent answer has emerged from this judicial scrutiny. As Justice Rubin wrote, "[t]he complexity of this issue may be inferred from the lack of consensus among the judges who have already considered it." Slip Op. at 9297 n.5. Two circuit judges and three district judges have found the tramway to

be a "consumer product."[1] Three circuit judges and one district judge have reached the opposite result after reasoned analysis.[2] A clear conflict exists between the Tenth Circuit and the Fifth Circuit on this issue. *Robert K. Bell Enterprises v. Consumer Product Safety Commission*, 645 F.2d 26 (10th Cir. 1981); *State Fair v. U.S. Consumer Product Safety Commission*, No. 80-1006, Slip Op. at 9292 (5th Cir. June 30, 1981).

The operative definitional language of the statute is as follows:

§2052. **Definitions**

(a) For purposes of this chapter:

(1) The term "consumer product" means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; but such term does not include —

One court noted the ambiguity of this definition. *Consumer Product Safety Commission v. Chance Mfg. Co.*, 441

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[1] Circuit Judges Rubin and Goldberg, *State Fair v. U.S. Consumer Product Safety Commission*, No. 80-1006, Slip Op. at 9292 (5th Cir. June 30, 1981); District Judge Higginbotham, *State Fair v. U.S. Consumer Product Safety Commission*, 481 F.Supp. 1070 (N.D. Tex. 1979); District Judge Cook, *Bell v. Consumer Product Safety Commission*, 484 F.Supp. 1221 (N.D. Okla. 1980); District Judge Weinshienk, sitting by designation, dissenting, *Robert K. Bell Enterprises v. Consumer Product Safety Commission*, 645 F.2d 26 (10th Cir. 1981).

[2] Circuit Judges Seth and Brietenstein, *Robert K. Bell Enterprises v. Consumer Product Safety Commission*, 645 F.2d 26 (10th Cir. 1981); Circuit Judge Ainsworth, *State Fair v. U.S. Consumer Product Safety Commission*, No. 80-1006, Slip Op. at 9304-9409 (5th Cir. June 30, 1981); District Judge Waters, *Walt Disney Productions v. United States Consumer Product Safety Commission*, No. 79-1070-LEW (Px) (S.D. Cal. April 18, 1979), rev'd on other grounds, No. 80-1006 (9th Cir. May 4, 1981). (Appendix "C").

F.Supp. 228, 231 (D.D.C. 1977). Another court observed that one of the exclusions, a "mirror image" of the general definition, was "hardly a model of clarity." *Kaiser Aluminum and Chemical Corporation v. United States Consumer Product Safety Commission*, 574 F.2d 178, 180 (3rd Cir. 1978). Even the majority in the court below perceived obscurity in the definition. The majority was "troubled by an apparent redundancy in the definition." Slip Op. at 9299. While the majority could "imply no insight" as to a portion of the definition, that uncertainty was not deemed important since the court was "not required to read this statute as if it were a wonderfully constructed jig-saw puzzle, with each word having only one precise place, yielding, when assembled, an unambiguous picture." Slip Op. at 9300. Petitioner submits that it is entitled to precision and clarity in a statute which authorizes a federal agency to intrude upon the premises and inspect private books and papers as well as the tramway itself.

The result of this fragmented and conflicting interpretation of the "consumer product" definition is that manufacturers, as well as entities situated as Petitioner, necessarily have uncertain expectations as to the probability of federal regulation. A national statute now has varying application depending upon nothing more than geography. An aerial tramway in Tulsa is free from Federal agency intrusion, yet the same tramway three-hundred miles to the south in Dallas will now be under strict Commission scrutiny. This uneven enforcement is also contrary to a stated declaration of purpose of the Consumer Product Safety Act: "to develop uniform safety standards for consumer products and to minimize conflicting state and local regulations." 15 U.S.C. §2052(b)(3).

Petitioner urges that the Tenth Circuit was correct in its interpretation of the definition. The Commission's assertion

of jurisdiction over the tramway is dependent upon application of subsection (ii) of Section 2052(a)(1) (a "consumer product" is an article produced or distributed "for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise.") It is beyond question that subsection (i) is inapplicable since a tramway is not produced or distributed "for sale to a consumer." Unless subsection (ii) was intended to expand the scope of agency jurisdiction beyond that contemplated by (i), a tramway is not a "consumer product."

The *Bell* court held that subsections (i) and (ii) were intended to cover the *same* universe of articles. According to the Tenth Circuit "(ii) was added later when consideration was given to distribution of articles to consumers not by sale but by gift, promotional samples, etc. ... This was added to include distribution to consumers of the same things but without a sale, and thereby to include articles produced or distributed 'for the personal use, consumption or enjoyment of a consumer.' This with (i) was to cover all types of distribution." 645 F.2d at 28. The court concluded that the Commission was unjustified in relying upon (ii) as an all-inclusive source of jurisdiction beyond the parameters of (i).

This reasoning by the *Bell* court is firmly supported by other cases and the legislative history of the Act itself. The District of Columbia Circuit has held that:

> "What clause (i) contemplates is a direct sale of the product to the consumer. The legislative history reveals that clause (ii) was intended to compliment clause (i) by reaching situations in which a consumer acquires the use of a product other than through a direct sale transaction, e.g., through lease, promotional gift, or purchase by an institution for consumer use."

The court then concluded:

> "Together, clauses (i) and (ii) were designed to ensure that the definition of consumer product would encompass the various modes of distribution through which consumers acquire products and are exposed to the risks of injury associated with those products."

Consumer Product Safety Commission v. Anoconda Company 593 F.2d 1314, 1320 (D.C. Cir. 1979). See also *ASG Industries, Inc. v. Consumer Product Safety Commission*, 593 F.2d 1323, 1328 (D.C. Cir. 1979). Significantly, the Report of the Senate Commerce Committee on the Consumer Product Safety Act indicated that a "consumer product" must be capable of production or distribution for sale to an individual, even though it is not necessary that a sale actually take place. S. Rep. No. 92-749, 92nd Cong., 2d Sess. (1972). Those authorities led the *Disney* court to conclude that a tramway was not a "consumer product" since it was not capable of being sold to an individual. *Walt Disney Productions v. United States Consumer Product Safety Commission*, *supra* at 5. (Appendix "C") The court below, while troubled by "an apparent redundancy" (Slip Op. at 9299), was forced to accept some "overlapping" in order to uphold the Commission's interpretation. No direct response to this argument was made, nor was there any attempt to distinguish or refute *Bell*.

Steck and Stapf also contends that since a tramway is not used by a consumer around his household or residence or at school, it is not a "consumer product." Mere use in recreation is insufficient. The Commission's interpretation is that Section (a)(1) should be read as follows: an article is a "consumer product" if it is produced or distributed for any one of the following purposes:

> 1. Sale to or use, consumption or enjoyment by a consumer in or around a permanent or temporary household or residence;

2. Sale to or use, consumption or enjoyment by a consumer in or around school;

3. Sale to or use, consumption or enjoyment by a consumer in recreation;

4. Sale to or use, consumption or enjoyment by a consumer otherwise.

Petitioner contends to the contrary that the phrase "in recreation, or otherwise" merely modifies the preceding words, "household or residence, a school." That is, an article is a "consumer product" if it is produced or distributed for any one of the following purposes:

1. Sale to or use, consumption or enjoyment by a consumer in or around a permanent or temporary household or residence, whether in recreation, or otherwise.

2. Sale to or use, consumption or enjoyment by a consumer in or around a school, whether in recreation, or otherwise.

Petitioner urges two propositions in support of this construction. First, the latter construction gives effect to the entire definition. "Otherwise" is an all encompassing term which when coupled with the preceding clause includes uses of the product at home, at school and any place else. That is, the Commission's interpretation would be that any use qualifies under clauses (i) and (ii). If that is so, what is the purpose of including home and school use? Why did Congress not just define consumer products as articles sold to consumers for use, or articles used, consumed or enjoyed by consumers? Under the Commission's interpretation the home and school use provisions are merely surplusage. It is well settled that a statute should not be construed in such a way as to render certain provisions superfluous or insignificant. *Ziegler Coal Company v. Kleppe*, 536 F.2d 398, 406 (D.C. Cir. 1976).

Second, the clauses referring to home and school use are generically dissimilar to the recreation provision. The terms

"household," "residence" and "school" all refer to places, whereas "recreation" refers to an activity. To place recreational use on the same level with home and school use, then the statute should read: "household or residence, a school, a playground, an amusement park, ..."

While the majority below conceded the "otherwise" term to be an enigma, the court chose to ignore the ambiguity and follow the Commission's interpretation. Again, the majority disregarded without comment the fact that both *Bell* and *Disney* were partly decided on the basis of this argument. Judge Ainsworth, dissenting from the majority opinion, found Petitioner's interpretation the "more reasonable and proper construction." Otherwise the Act's jurisdiction is "virtually limitless." Slip Op. at 9304-9305.

The majority first contends that "in recreation" is not merely a modifier because it is followed by a comma. It is inconceivable that the majority could in one paragraph shrug off as meaningless the ambiguity created by the term "otherwise," and in another paragraph divine clear congressional intent from a mere comma. If Congress was unable to clearly express its meaning with the *words* chosen, why should it be presumed congressional *punctuation* was any more adept?

The majority also supports its interpretation by referring to the exemptions for aircraft and boats expressly included in the Act. The Act itself does not indicate that the list which includes aircraft and boats is a list of "exemptions." Rather, it states that the term "consumer product" "does not include" such items. 15 U.S.C. §2052(a)(1). As the *Bell* court stated: "[A]n exclusion in a definition is a device to clarify what has been affirmatively stated." 645 F.2d at 29. Thus, the list of items not included merely reaffirms that the definition does not embrace those products.

The majority concludes that the only plausible explanation for inclusion of the term "otherwise" is that it is an "assurance of comprehensiveness." It is certain that if the majority opinion is allowed to stand then comprehensiveness will indeed be assured. Even the *Chance* court indicated that such an "obliteration of jurisdictional limits" is insupportable. *Consumer Product Safety Commission v. Chance Mfg. Co.*, 441 F.Supp. 228, 233 (D.C.D. 1977). The majority states that it is not required to "announce that any non-industrial product posing hazards to individuals constitutes a consumer product"; yet, surely that is the inevitable result. If "recreation" is an independent jurisdictional base, then so too must "otherwise." This very danger is the major concern expressed in Judge Ainsworth's dissent.

All courts which have held tramways not to be "consumer products" relied to a great extent upon the legislative history of the Act. That history demonstrates a congressional concern over injuries due to household and school products only.[3] Skyrides were never even mentioned; nor was any other amusement park ride. Most significantly, Congress has, since the decision by the Court below, enacted into law an amendment to the Act which expressly excludes amusement park rides.

The amendment to §2052(a)(1) is as follows:

". . . such term ["consumer product"] does not include —

* * * * *

[3] See Report of the Senate Commerce Committee on Consumer Product Safety Act, S. Rep. No. 92-749, 92d Cong., 2d Sess. (1972); Report of House Committee on Interstate and Foreign Commerce on Consumer Product Safety Act, H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. (1972); Report of the Conference Committee on Consumer Product Safety Act, H.R. Rep. No. 92-1593, 92d Cong., 2d Sess. 37 (1972); S.J. Res. 33, Pub.L. No. 90-146, 81 Stat. 466 (CR2, P.90); 118 Cong. Rec. 21847; 21897-901 (1972).

(J) any mechanical device (i) which carries or conveys passengers along, around, or over a fixed or restricted route or course or within a defined area for the purpose of giving its passengers amusement, and (ii) which is customarily controlled or directed by an individual who is employed for that purpose and who is not a consumer with respect to such article."

S.B. 1155, 27th Cong., 1st Sess. 89 (1981). A tramway at the State Fair of Texs falls squarely within this exclusion.

Petitioner contends that the passage and enactment of this amendment bolsters its position in two respects. First, the amendment demonstrates a legislative intent that tramways were not meant to be regulated by the Commission. A later act of Congress can be considered a legislative interpretation of an earlier act "in the sense that it aides in ascertaining the meaning of the words, as used in their contemporary setting." *United States v. Stewart*, 311 U.S. 60, 64-65, 61 S. Ct. 102, 85 L.Ed. 40 (1940).

Petitioner strongly urges that the amendment should be given retroactive application so as to deprive the Commission of jurisdiction in the instant case. It is well settled that when a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law. *Bruner v. United States*, 343 U.S. 112, 72 S.Ct. 581, 96 L.Ed. 786 (1952); *Barthelemy v. J. Ray McDermott & Co., Inc.*, 537 F.2d 168 (5th Cir. 1976); *Garrett v. Banford*, 582 F.2d 810 (3rd Cir. 1978); *Iowa Public Service Co. v. I.C.C.*, 643 F.2d 542 (8th Cir. 1981). Assuming, as the Commission contends, that a tramway was a "consumer product" under the original Act, then the amendment would operate to repeal that grant of jurisdiction. The amendment contained no reservation as to pending cases. Under these circumstances retroactive application is appropriate. Even if the Court below was correct at to interpretation of §2052(a) (1), the amendment mandates reversal.

II.

The grounds of the State Fair of Texas are not an area where tramways are manufactured.

The express terms of the Act authorize inspection by the Commission only in areas "where such products are manufactured, held, or transported and which relate to the safety of such products." 15 U.S.C. §2065(a) (2). The term "manufactured" means "to manufacture, produce, or assemble." 15 U.S.C. §2052(a) (8). The court below held, contrary to the opinion of the district court, that since the tramway was "assembled" on the State Fair grounds, the jurisdictional requisite was met. Slip Op. at 9303. The only authority cited was the district court opinion in *Bell*.

The evidence is undisputed that the tramway was manufactured, in the ordinary sense of the term, in Switzerland. The tramway was set up on the State Fair grounds by Rogers-Gulledge, Inc., long before Petitioner undertook to operate the ride.

The clear implication of the language of the statute — areas "where such *products are manufactured*" [emphasis added] — is that only those areas regularly used to assemble such goods are covered. As the district court held:

> "A more reasonable interpretation of Congress' purpose in defining 'manufactured' to include 'to assemble' is that Congress intended to embrace the situation where a factory receives component parts manufactured elsewhere and constructs ('assembles') consumer products on its premises from these component parts. For example, a factory assembling television sets from component parts manufactured elsewhere is itself a manufacturer within the meaning of the Act. Common sense indicates that this is the situation that Congress had in mind when it defined 'manufactured' to include 'to assemble,' and not the situation in which routine maintenance and repairs are performed on an individual product, as is the case with the tramway at State Fair. Similarly, assistance in

the installation of a single product does not render the person providing such assistance a manufacturer under the Act."

State Fair of Texas v. U.S. Consumer Product Safety Commission, supra at 1979. The grounds of the State Fair are not such areas that Congress contemplated for inspection by the Commission.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully prays that its Petition for Writ of Certiorari be in all things granted and that this Court reverse and render the judgment of the Court of Appeals in favor of Petitioner.

Respectfully submitted,

VIAL, HAMILTON, KOCH, TUBB, KNOX & STRADLEY
1500 Republic Bank Tower
Dallas, Texas 75201
(214) 748-4541

By: _____
JEFFREY S. LYNCH

By: _____
GERALD R. POWELL

WOODRUFF & ELLIS
2322 Republic Bank Tower
Dallas, Texas 75201
(214) 747-9001

By: _____
ALFRED W. ELLIS

Attorneys for Petitioner,
Steck and Stapf Attractions, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by certified mail, return receipt requested on this the 16 day of September, 1981, to each of the following counsel of record:

MR. ERIC L. STONE
Staff Attorney
Division of Administrative Litigation
U. S. Consumer Product Safety Commission
Washington, D. C. 20207

RUSSELL B. SMITH
One Turtle Creek Village
Suite 619
Dallas, Texas 75219

DAVID M. KENDALL
Thompson & Knight
Two Wahrenberger House
208 West Fourteenth Street
Austin, Texas 78711

Gerald R. Powell

GERALD R. POWELL

APPENDIX A

The STATE FAIR OF TEXAS

v.

UNITED STATES CONSUMER PRODUCTS SAFETY COMMISSION.

No. CA-3-79-1367-G.

United States District Court,
N. D. Texas,
Dallas Division.

Nov. 13, 1979.

In a consolidated action to determine the United States Consumer Product Safety Commission's authority, under an administrative inspection warrant, to inspect aerial tramway at the Texas State Fair, the District Court, Patrick E. Higginbotham, J., held that: (1) the Consumer Product Safety Act must be regarded as an implied basis of jurisdiction for actions seeking administrative inspection warrants under the Act; (2) the tramway is a "consumer product" within meaning of the Act; and (3) the Commission failed to show its authority to investigate accident involving the tramway, since the tramway was not "manufactured" by the State Fair when it supplied the earth fill necessary to raise the surface of the land for use as a north terminal of the tramway, nor by routine maintenance on the tramway, and since the State Fair and its licensee, by selling tickets for rides on the tramway, did not thereby hold the ride for distribution after introduction into commerce.

Order in accordance with opinion.

1. Consumer Protection

Consumer Product Safety Act must be regarded as an implied basis of jurisdiction for actions seeking administrative inspection warrants under the Act. Consumer Product Safety Act, §§ 2 et seq., 16(a), 15 U.S.C.A. §§ 2051 et seq., 2065(a).

2. Administrative Law and Procedure

In the exhaustion area, a litigant may bypass available administrative procedures only where there is a readily observable usurpation of power not granted to the agency by Congress.

3. Administrative Law and Procedure

A magistrate must examine an agency's statutory jurisdiction as a prerequisite to authorization of the investigatory remedy of administrative search. Consumer Product Safety Act, §§ 2 et seq., 16, 15 U.S.C.A. §§ 2051 et seq., 2065.

4. Consumer Protection

Aerial tramway at the Texas State Fair is a "consumer product" within meaning of the Consumer Product Safety Act. Consumer Product Safety Act, §§ 3(a)(1), 16(a)(1), 15 U.S.C.A. §§ 2052(a)(1), 2065(a)(1).

See publication Words and Phrases for other judicial constructions and definitions.

5. Consumer Protection

As regards the Consumer Product Safety Act's definition of "consumer product," bulk is not to be considered in determining the boundaries of the term "article." Consumer Product Safety Act, § 3(a)(1), (a)(1)(H), 15 U.S.C.A. § 2052(a)(1), (a)(1)(H).

6. Consumer Protection

As regards the Consumer Product Safety Act, a consumer product is not necessarily a household product. Consumer Product Safety Act, § 3(a)(1), 15 U.S.C.A. § 2052(a)(1).

7. Consumer Protection

While the Consumer Product Safety Act's definition of "consumer product" at one point utilizes the adjective "personal," Congress did not intend to import a "control" requirement into the definition of the term "consumer product." Consumer Product Safety Act, § 3(a)(1), 15 U.S.C.A. § 2052(a)(1).

8. Consumer Protection

Aerial tramway at Texas State Fair could be considered a "consumer product" for purposes of the Consumer Product Safety Act, even though the tramway was not being sold to consumers. Consumer Product Safety Act, § 3(a)(1), 15 U.S.C.A. § 2052(a)(1).

9. Consumer Protection

In respect to the Consumer Product Safety Act's definition of the term "consumer product," the exception for "any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer" was inapplicable to aerial tramway at Texas State Fair, since the statutory exclusion is intended to exclude industrial products. Consumer Product Safety Act, § 3(a)(1), 15 U.S.C.A. § 2052(a)(1).

10. Consumer Protection

While the Consumer Product Safety Commission is authorized by statute to obtain samples of consumer products,

the impracticality of doing so does not preclude the subject article from being included in the definition of a "consumer product." Consumer Product Safety Act, §§ 3(a)(1), 17(b), 27(f), 15 U.S.C.A. §§ 2052(a)(1), 2066(b), 2076(f).

11. Consumer Protection

Consumer Product Safety Commission failed to show its authority to investigate accident involving aerial tramway at Texas State Fair, since the tramway was not "manufactured" by the State Fair when it supplied the earth fill necessary to raise the surface of the land for use as a north terminal of the tramway, nor by routine maintenance on the tramway, and since the State Fair and its licensee, by selling tickets for rides on the tramway, did not thereby hold the ride for distribution after introduction into commerce. Consumer Product Safety Act, §§ 3(a)(1, 8), 16, 16(a), 15 U.S.C.A. §§ 2052(a)(1, 8), 2065, 2065(a).

12. Consumer Protection

As regards the Consumer Product Safety Act's definition of "consumer product," Congress cannot have intended that any person who assists in the installation of a consumer product or performs routine repairs or maintenance on such product has thereby "manufactured" the product. Consumer Product Safety Act, §§ 3(a)(1, 8), 16, 16(a), 15 U.S.C.A. §§ 2052(a)(1, 8), 2065, 2065(a).

13. Consumer Protection

In respect to provision of the Consumer Product Safety Act permitting inspection of consumer products within the areas the commission may enter, the "in connection with distribution in commerce" requirement is engrafted on that statutory provision through its relationship with the preceding provision. Consumer Product Safety Act, § 16(a)(1, 2), 15 U.S.C.A. § 2065(a)(1, 2).

14. Administrative Law and Procedure

An administrative agency vested by Congress with investigative and inquisitorial powers must be allowed to first determine if a product or firm is within its congressional charge except in those cases when jurisdiction is obviously absent.

Kelly, Hart & Hallman, Fort Worth, Tex., by E. Glen Johnson, Russell B. Smith, Dallas, Tex., for State Fair of Texas.

Jeffrey S. Lynch, Christopher A. Payne, Vial, Hamilton, Koch, Tubb, Knox & Stradley, Dallas, Tex., for Steck & Stapf Attractions.

Kenneth J. Mighell, U.S. Atty., Fort Worth, Tex., Stafford Hutchinson, Asst. U.S. Atty., Dallas, Tex., John R. Fleder, Asst. Chief, Consumer Affairs Section, Anti-Trust Div., Dept. of Justice, Washington, D.C., for Consumer Products Safety Comn.

MEMORANDUM ORDER

PATRICK E. HIGGINBOTHAM, District Judge.

As anticipated by the court in its memorandum order of November 3, 1979, the substantive issues presented by this case, left undecided by the court's earlier decision, have again come before the court, this time ripe for resolution. In its earlier memorandum order, the court denied the application of plaintiff, The State Fair of Texas ("State Fair") for a preliminary injunction restraining the defendant, United States Consumer Product Safety Commission ("Commission") from conducting an investigation of an accident involving defendant's aerial tramway which occurred

on October 21, 1979. In so doing, the court held that State Fair was not threatened with irreparable injury, inasmuch as it could legally refuse permission for an inspection of the tramway and related records, forcing the Commission to obtain an administrative inspection warrant if it wished to inspect. In light of the probability that such a warrant would be sought, the court declined to dismiss the case as unripe, choosing instead to retain jurisdiction of the underlying claim for declaratory relief until events transpired which brought those issues squarely into focus. Such an occasion has now arisen.

On November 5, 1979, the Commission sought and obtained an *ex parte* administrative inspection warrant from United States Magistrate William F. Sanderson, Jr. That warrant, based upon affidavits from Commission personnel reciting the need for an inspection and stating that permission for a warrantless inspection had been refused, authorized the Commission to enter the premises of State Fair and of its licensee, Steck & Stapf Attractions, Inc. ("S & S"), and to inspect the tramway and its components in a nondestructive manner. The warrant also authorized inspection of nine categories of books and records within the possession, custody, or control of State Fair. The warrant was served on State Fair and S & S officials the same day, and those officials on advice of counsel refused entry pursuant to the warrant. On November 6, the Commission moved before Megistrate Sanderson for an order requiring State Fair and S & S to show cause why they should not be held in contempt. Simultaneously, State Fair moved before the magistrate to quash the warrant, asserting, as it had earlier before this court, that the Commission's jurisdiction to conduct inspections does not extend to products such as the aerial tramway or entities such as State Fair. In the interest of judicial economy, both motions were transferred

to this court by the magistrate.[1] While these activities were taking place before the magistrate, a separate action was commenced by plaintiff Steck and Stapf Attractions, Inc., the operator of the tramway under a license agreement with State Fair. S & S sought injunctive relief against the Commission's planned inspection insofar as it involved records and tramway components in the possession or under the control of S & S.[2] That action, initially assigned to Judge Barefoot Sanders, was transferred to this court and consolidated with the present action by order of Judge Sanders on November 6.[3]

The basic facts which underlie this action were set forth in the court's memorandum order of November 3. Since that time, the parties have supplemented the record by means of numerous affidavits and stipulations. Such additional and undisputed facts as are required for decision of this case will be set forth in the body of this opinion.

I. Congressional Authorization of Applications for Warrants.

It is necessary at the outset to deal with the contention made by the State Fair that the Consumer Product Safety Act, even if arguably applicable, does not authorize issu-

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[1] The action before the magistrate, styled *In re Establishment Inspection of State Fair of Texas and Steck and Stapf Attractions, Inc.*, Magistrate's Docket No. 3-79-132M, was consolidated with this action by order of this court dated November 8, 1979, and without objection of the parties.

[2] The claim with respect to records was dropped after it was determined that no records were sought from S & S by the Commission.

[3] The S & S action was styled *Steck & Stapf Attractions, Inc. v. United States Consumer Product Safety Commission*, Civil Action No. CA-3-79-1388-H.

ance of an administrative inspection warrant.[4] In so arguing, State Fair relies heavily on the recent case of *Marshall v. Gibson's Products, Inc.*, 584 F.2d 668 (5th Cir. 1978). That case was an action brought by the Secretary of Labor seeking a mandatory injunction to require an employer to submit to a warrantless inspection under the Occupational Safety and Health Act ("OSHA"). The court of appeals held that 29 U.S.C. § 657(a)(1), which authorizes the Secretary to conduct inspections similar in nature to those which the Commission may conduct under 15 U.S.C. § 2065(a), provided no implicit basis of jurisdiction for the action, and that jurisdiction could not be sustained under the Secretary's regulations or under general statutory grants of jurisdiction.

[1] In contrast with the relief sought in *Gibson's*, the relief sought by the Commission in this case takes the form of an administrative inspection warrant rather than a mandatory injunction. In the case of *Marshall v. Shellcast Corp.*, 592 F.2d 1369 (5th Cir. 1979), which extended the *Gibson's* holding to an action seeking an injunction requiring compliance with an administrative inspection warrant, the court expressly noted that "the provision or preclusion of jurisdiction for the issuance of search warrants is quite a different matter from the provision or preclusion of jurisdiction for an injunction." 592 F.2d at 1371 n.3. The court cited Congressional concern over the constitutionality of OSHA, together with the Supreme Court's decision in *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305

[4] This argument was first made at a very late stage of the proceedings and notwithstanding the fact that State Fair had expressly conceded such authority at the hearing held by the court on November 6. While the court would ordinarily not consider arguments raised under such circumstances, the doctrine that lack of subject matter jurisdiction may not be waived by the parties, and must be noted by the court *sua sponte* if necessary, is sufficiently implicated that the argument will be addressed. *See Marshall v. Gibson's Products, Inc.*, 584 F.2d 668, 672 (5th Cir. 1978).

(1978) (nonconsensual warrantless searches under OSHA are unconstitutional), as "argu[ing] strongly for the position that federal courts do have jurisdiction to issue OSHA search warrants." 592 F.2d at 1370 — 71 n.3. Indeed, this court has expressly so held with respect to OSHA warrants. *Marshall v. Huffhines Steel Co.*, 478 F.Supp. 986 (N.D.Tex., 1979) (order denying motion to dismiss). It must be presumed that Congress possessed similar concerns over the constitutionality of the Consumer Product Safety Act, and hence that Act must be regarded as an implied basis of jurisdiction for actions seeking warrants under the Act. A contrary holding would render 15 U.S.C. § 2065 a nullity, since the Commission would be unable to obtain a warrant and yet could not inspect without a warrant by virtue of *Barlow's*.

A further basis for the decision in *Gibson's* was provided by the language of OSHA itself. Although several sections of OSHA gave the district courts jurisdiction in specific instances, that Act contained no grant of general authority to the Secretary of Labor to bring suit under its provisions. While the Solicitor of Labor was authorized to appear on behalf of the Secretary "in any civil litigation brought under [OSHA]," *see* 29 U.S.C. § 663, the court held that this provision did not expand the category of suits which the Secretary could bring. It accordingly failed to find jurisdiction of the suit under 28 U.S.C. § 1345 as a civil action commenced by an officer or agency of the United States "expressly authorized to sue by Act of Congress." 584 F.2d at 676-77.

The provisions of OSHA, authorizing suit only in specific instances, stand in stark contrast to those of the Consumer Product Safety Act. 15 U.S.C. § 2076(b)(7) authorizes the Commission "to initiate, prosecute, defend, or appeal ..., through its own legal representative and in the name of the

Commission, *any civil action* ... for the purpose of enforcing the laws subject to its jurisdiction," if the Attorney General does not assume responsibility for conducting the action in the Commission's behalf (emphasis supplied).[5] Hence the Commission fits squarely within the language of 28 U.S.C. § 1345 as an agency "expressly authorized" to bring suit.[6] Accordingly, State Fair's arguments concerning this court's lack of jurisdiction to issue a warrant must be rejected.

II. Scope of This Court's Review.

[2] The Commission argues at some length that the scope of this court's review of its decision to investigate a particular product or entity must necessarily be limited. In so arguing, it analogizes this proceeding to an action for enforcement of an administrative subpoena *duces tecum*, and points to that line of cases, discussed more fully below, which holds that a district court may not inquire into an agency's jurisdiction so long as the material sought by subpoena is not "plainly incompetent or irrelevant to any lawful

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[5] The statute provides for 45 days' written notice to the Attorney General before the Commission may proceed through its own legal representative. While no such notice has been given, the Commission has been represented throughout these proceedings by attorneys from the Department of Justice as well as by its own attorneys, thus satisfying the statutory requirement.

[6] In an apparent attempt to come within the provision of § 1345 authorizing suit by the United States, some pleadings on behalf of the Commission have purportedly been filed by the United States. In light of its holding on the jurisdictional questions discussed above, the court has treated these pleadings as having been filed by the Commission. The United States is not a party to this action, and its inclusion as a party would raise substantial questions of its standing. *See Gibson's*, *supra*, at 676 n.10; *In re Debs*, 158 U.S. 564 (1895); *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977); Note, *Nonstatutory Executive Authority to Bring Suit*, 85 Harv.L.Rev. 1566, 1571 (1972). Such questions are avoided in the case of an action brought by the Commission pursuant to its statutory authority.

purpose" of an agency. *See Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509, 63 S.Ct. 339, 343, 87 L.Ed. 424 (1943). This doctrine, while not strictly one of exhaustion of administrative remedies, stems from concerns over the effects of premature judicial interference with administrative processes similar to those which have prompted the exhaustion doctrine. In the exhaustion area, the law is clear that a litigant may bypass available administrative procedures only where there is a readily observable usurpation of power not granted to the agency by Congress. *Leedom v. Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958). *American General Insurance Co. v. F.T.C.*, 496 F.2d 197, 200 (5th Cir. 1974); *United States v. Feaster*, 410 F.2d 1354, 1366-68 (5th Cir.), *cert. denied*, 396 U.S. 962, 90 S.Ct. 427, 24 L.Ed.2d 426 (1969).

In *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946), the Court was faced with the question of the scope of review of the jurisdiction of the Wage and Hour Administration in enforcement by a district court of the Administrator's subpoena *duces tecum*. In holding that the district court must enforce the subpoena without requiring the Administrator to demonstrate his jurisdiction, the Court stated:

> Congress has authorized the Administrator, rather than the district courts in the first instance, to determine the question of coverage in the preliminary investigation of possibly existing violations; in doing so to exercise his subpoena power for securing evidence upon that question, by seeking the production of petitioners' relevant books, records and papers; and, in case of refusal to obey his subpoena, issued according to the statute's authorization, to have the aid of the district court in enforcing it.

327 U.S. at 214, 66 S.Ct. at 508. *Accord, United States v. Morton Salt Co.*, 338 U.S. 632, 641-43, 70 S.Ct. 357, 94 L.Ed. 401 (1950); *Endicott Johnson Corp. v. Perkins*, *supra*,

317 U.S. at 509, 63 S.Ct. 339; *F.T.C. v. Texaco, Inc.*, 180 U.S.App.D.C. 390, 399-401, 555 F.2d 862, 871-73 (D.C.Cir.), *cert. denied*, 431 U.S. 974, 97 S.Ct. 2939, 53 L.Ed.2d 1072 (1977); *F.T.C. v. Gibson*, 460 F.2d 605, 608 (5th Cir. 1972); *Genuine Parts Co. v. F.T.C.*, 445 F.2d 1382, 1391 (5th Cir. 1971). In these cases, the courts have reasoned that the minimal expense and disruption suffered by a private party as a result of an agency investigation is generally insufficient to warrant cutting off the agency's inquiry, often before it has obtained sufficient facts to clearly demonstrate its jurisdiction. *See Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938).

All these cases arose in the context of district court enforcement of administrative subpoenas. While the scope of review of administrative search warrants rests upon the same balancing of the conflicting interests of agencies and private parties as in the case of administrative subpoenas, the differing degrees of hardship suffered by the party under investigation may warrant a different resolution of the issue. The Court in the *Oklahoma Press* case expressly recognized that a judicial order providing for enforcement of a subpoena *duces tecum* did not present the same Fourth Amendment considerations as would an actual search and seizure. *Oklahoma Press*, *supra*, 327 U.S. at 195-96, 202-08, 66 S.Ct. 494. An administrative subpoena, requiring production of documents for examination and copying and witnesses for examination under oath, constitutes a far less serious disruption of an organization's day-to-day activities than does the physical entry of agency employees onto the organization's business premises for inspection purposes. *Cf. See v. City of Seattle*, 387 U.S. 541, 545, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967) (illogical to require greater safeguards for subpoenas than for warrants). At the same time, the disruption inherent in the execution of an administrative inspection warrant formed the basis for the Supreme

Court's recent decision in *Barlow's, supra*, and so it is logical to turn to that case for aid in applying this balancing test.

In describing the functions served by an administrative inspection warrant, Justice White wrote for the Court that

> [t]he authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative offices, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, *is authorized by statute*, and is pursuant to an adminstrative plan containing specific neutral criteria.

436 U.S. at 323, 98 S.Ct. at 1825-1826 (emphasis supplied). Justice Stevens in dissent echoed these three functions (although he argued that the purposes of administrative warrants were otherwise met), stating that one purpose of the inspection warrant is "to inform the employer that the inspection is authorized by the statute." 436 U.S. at 332, 98 S.Ct. at 1830. Thus it would appear that one element of the "administrative probable cause" which must be found by the magistrate is statutory authority for the inspection.

[3] This view is supported by the analysis in *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), upon which the decision in *Barlow's* was in large measure based. In *Camara*, the government asserted that the function of a magistrate in issuing an administrative warrant must necessarily be ministerial unless he is willing to engage in a comprehensive review of the exercise of agency discretion which led to the request for the warrant. In responding to this argument, the Court noted that the magistrate's function involved review of a number of matters, including the authority of the inspection, the lawful limits of his power to search, and whether nonconsensual

entry onto private premises was required in order to enforce the statute, all of which could be determined without reassessment of the discretion exercised by the agency. The teaching of *Camara* and *Barlow's* is that one of the purposes served by the administrative warrant requirement is to assure the landowner that a neutral official is satisfied that the agency is authorized by law to conduct the search. Thus it follows that a magistrate must examine an agency's statutory jurisdiction as a prerequisite to authorization of the more intrusive investigatory remedy of administrative search.

This holding in no way thwarts the Commission in its preliminary efforts to obtain sufficient facts on which to base an informed assessment of its own jurisdiction. The Commission has a broad spectrum of investigatory tools at its disposal. In addition to inspections pursuant to 15 U.S.C. § 2065 and 16 C.F.R. § 1182 [44 Fed.Reg. 31,929-30 (1979)], the Commission may issue subpoenas *duces tecum*, 15 U.S.C. § 2076(b)(3); 16 C.F.R. §§ 1118.3(a)(1) and 1118.4; conduct investigational hearings, 15 U.S.C. § 2076(a); 16 C.F.R. §§ 1118.3(a)(2) and 1118.5; take depositions, 15 U.S.C. § 2076(b)(4); 16 C.F.R. §§ 1118.3(a)(3) and 1118.6; and issue general or special orders (analogous to interrogatories under Fed.R. Civ.P. 33), 15 U.S.C. § 2076(b)(1); 16 C.F.R. §§ 1118.3(a)(4) and 1118.8. The court today holds only that the Commission must be able to demonstrate its own jurisdiction before seeking the aid of the court in making use of the most disruptive of the arrows in this investigatory quiver. The Commission having chosen to proceed by administrative search warrant without first conducting an investigation by other means, it becomes this court's task to determine whether the limited record before it demonstrates that the Commission has jurisdiction. This in turn depends on whether State Fair's aerial tramway is a "consumer product" under the Act, and on whether inspection

of the tramway is authorized by 15 U.S.C. § 2065. To each of these questions the court now turns.

III. The Aerial Tramway's Status as a "Consumer Product".

[4] In order for § 16(a)(1) of the Consumer Product Safety Act, 15 U.S.C. § 2065(a)(1), to authorize an inspection of the aerial tramway at the State Fair, the ride must be a consumer product within the meaning of § 3(a)(1) of the Act, 15 U.S.C. § 2052(a)(1). The issue of whether an amusement park ride is a consumer product within the meaning of this Act is one of first impression in this circuit. Those courts which have addressed this issue offer different answers. In *Consumer Product Safety Commission v. Chance Manufacturing Co.*, 441 F.Supp. 228 (D.D.C.1977), the court held that the "Zipper," a ride consisting primarily of a boom which rotates in a 360 degree arc, is a consumer product. In *Walt Disney Productions v. United States Consumer Product Safety Commission*, No. 79-0170-LEW (Px) (C.D.Cal., April 17, 1979), *appeal docketed*, No. 79-3435 (9th Cir. 1979), the court found that the sky rides at Disneyland and Disney World are not consumer products.

Through consideration of the individual elements in the statutory definition of "consumer product," this court concludes that the term covers the aerial tramway here involved. The Act declares that:

> The term "consumer product" means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around permanent or temporary household or residence, a school, in recreation, or otherwise; but such term does not include—
>
> > (A) any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer ...

15 U.S.C. § 2052(a)(1). The Act goes on to provide specific exemptions for a variety of products unrelated to this sort of amusement park ride. Redefined, the question with which we are faced is whether this ride is an "article ... produced or distributed for the personal use ... or enjoyment of a consumer ... in recreation" that does not fall within the exception quoted above.

[5] The tramway is an "article," being "an object produced or distributed as a distinct article of commerce, rather than any physical entity that might exist only at an intermediate stage of production." *Consumer Product Safety Commission v. Anaconda Co.*, 193 U.S.App.D.C. 160, 165, 593 F.2d 1314, 1319 (D.C.Cir. 1979). That the tramway is large ought not concern us. Were bulk to be considered in determining the boundaries of the term "article," Congress would not have needed to expressly exempt aircraft from designation as a consumer product. *See* 15 U.S.C. § 2052(a)(1)(H).

The ride was clearly produced "for the personal use ... or enjoyment" of consumers "in recreation," as those terms are normally understood. We can dispose of a variety of grounds for challenging this assertion. Given the nature of the site of the tramway, and the expense, speed, and other features of the ride itself, an argument that the ride was not intended for the enjoyment of recreation-minded consumers fails.

[6] A second argument is that only household products can properly be considered consumer products. It would be unnatural to read the phrase "in recreation" as modifying the preceding phrase "in or around a ... household or residence, a school, ..." Because "or" is used in that segment of the definition of consumer product, each of the nouns in that segment serves as an independent jurisdictional base. *Chance, supra* at 233; *ASG Industries, Inc. v. Consumer*

Product Safety Commission, 193 U.S.App.D.C. 169, 174 n.16, 593 F.2d 1323, 1328 n.16 (D.C.Cir.), *cert. denied*, ——— U.S. ———, 100 S.Ct. 133, 62 L.Ed.2d 87 (1979). It follows that a consumer product is not necessarily a household product.

[7] Third, one might assert that the adjective "personal" incorporates the concept of individual dominion and control with respect to transfers to consumers not involving a sale. But courts simply have not held that the term "personal" imports a control requirement. *See Consumer Product Safety Commission v. Chance Manufacturing Co.*, *supra*, at 233; *Kaiser Aluminum & Chemical Corp. v. United States Consumer Product Safety Commission*, 574 F.2d 178, 180 (3rd Cir.), *cert. denied*, 439 U.S. 881, 99 S.Ct. 218, 58 L.Ed.2d 193 (1978). In *Chance*, the court held that:

> [t]hough the riders of the Zipper do not control it, own it, or otherwise possess it, their occupancy of its cars and concomitant exposure to whatever dangers it may present are sufficient to satisfy the "personal use, consumption or enjoyment" clause.

Id. In addition, the court asserted that nowhere does the legislative history of the Act suggest that "Congress intended to import a 'control' requirement into the definition of the term 'consumer product.'" *Id.*

[8] Fourth, State Fair argues that because the tramway is not being sold to consumers it cannot be considered a consumer product. This argument also fails. Pointedly, the requirement that the product customarily be "produced or distributed for sale" was eliminated prior to enactment. The amended definition only required that the article be produced or distributed for a consumer's use. *See* Note, *The Consumer Product Safety Commission: An Agency Manual*, 43 Geo.Wash.L.Rev. 1077, 1082-83 (1975). Indeed, the House Report asserted that:

> ... products which are manufactured for lease and products distributed without charge ... are included within the definition and would be subject to regulation .... Also, products which are primarily or exclusively sold to industrial or institutional buyers would be included within the definition of consumer product so long as they were produced or distributed for the *use* of consumers.

H.R.Rep.No. 1153, 92d Cong., 2d Sess. 27 (1972).

[9] Finally, the ride is not a product which is "not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of a consumer." This exclusion was intended to exclude industrial products, on the premise that industrial purchasers can better protect themselves and are subject to regulation under the Occupational Safety and Health Act of 1970. *Kaiser Aluminum, supra*, at 180-81. It can hardly be maintained that aerial tramways are produced for any reason but for the use or enjoyment of a consumer: the ride is simply not an industrial product. Moreover, this ride, though not purchased by consumers, exposes them to possible danger and is not regulated under OSHA.

[10] The only forceful argument that the ride cannot be considered a "consumer product" lies outside the definition provided by the Act. As the court in *Disney, supra*, pointed out, § 2066(b) authorizes the Commission to obtain "free samples" of any consumer product offered for import into the United States and § 2076(f) authorizes the Commission, in the exercise of its functions, to purchase at cost any consumer product it needs. Because of the cost of aerial tramways, it seems unrealistic to speak of acquiring them free or at cost. But were the ability to be sampled required of a consumer product, there would have been no need to expressly exempt aircraft from the Act's coverage. And while acquiring samples of an entire tramway may not be feasible, the Commission may well acquire various compo-

nents thereof. Given that the tramway fits comfortably within that language in the Act expressly set out as the definition of consumer product, a peripheral appearance of inconsistency ought not affect the outcome. Any inconsistency is peripheral at best because there is nothing in the idea that the Commission is authorized to obtain samples that leads one to the conclusion that where it is impractical to do so, no right of inspection was intended. The Commission is authorized, not required, to sample.

IV. The Commission's Inspection Authority.

[11] The foregoing analysis demonstrates that State Fair's aerial tramway is encompassed within the expansive definition of "consumer product" contained in 15 U.S.C. § 2052(a)(1). The answer to this question does not resolve the present dispute, however, but merely brings a subsidiary question into focus. Once it is determined by reference to § 2052(a)(1) that a product is a "consumer product" under the Act, it is necessary to turn to § 2065 and related sections to determine the entities in whose hands the product is subject to inspection and the locations in which the product may be inspected. We find that the Commission has not yet provided this court with enough information to demonstrate its authority to conduct this investigation.

15 U.S.C. § 2065(a) authorizes the Commission "to enter, at reasonable times, any factory, warehouse, or establishment in which consumer products are manufactured or held, in connection with distribution in commerce" and "to inspect ... those areas of such factory, warehouse, or establishment where such products are manufactured, held, or transported and which may relate to the safety of such product." To fully interpret this language, it is necessary to make use of the various definitions contained in 15 U.S.C. § 2052(a).

The Commission first argues that State Fair and S & S have manufactured the tramway. 15 U.S.C. § 2052(a)(8) defines "manufactured" as "to manufacture, produce, or assemble." The Commission points to the action of State Fair in supplying the earth fill to raise the surface of the land for use as the north terminal of the tramway as an act of manufacture, and argues that State Fair and S & S "assemble" the tramway whenever they perform routine maintenance on the tramway, such as replacing worn components or repairing or replacing malfunctioning parts.

[12] The weakness of the Commission's argument is clear. Congress cannot have intended that any person who assists in the installation of a consumer product or performs routine repairs or maintenance on such a product has thereby "manufactured" the product. Such an argument would mean that a television repairman replacing tubes in a set, an electrician replacing a worn cord on a lamp, or even a parent replacing the chain on his child's bicycle, is "manufacturing" the consumer product on which he works. Congress cannot have intended such an anomalous result.

A more reasonable interpretation of Congress' purpose in defining "manufactured" to include "to assemble" is that Congress intended to embrace the situation where a factory receives component parts manufactured elsewhere and constructs ("assembles") consumer products on its premises from these component parts. For example, a factory assembling television sets from component parts manufactured elsewhere is itself a manufacturer within the meaning of the Act. Common sense indicates that this is the situation that Congress had in mind when it defined "manufactured" to include "to assemble," and not the situation in which routine maintenance and repairs are performed on an individual product, as is the case with the tramway at State Fair. Similarly, assistance in the installation of a single product

does not render the person providing such assistance a manufacturer under the Act. We are not saying that the Commission will not be able to show that State Fair did not "assemble" the tramway, but only that the Commission has not yet done so.

The Commission next argues that State Fair is an "establishment in which consumer products are ... held, in connection with distribution in commerce." *See* 15 U.S.C. § 2065(a)(1)(A). "Distribution in commerce" is defined by 15 U.S.C. § 2052(a)(11) as meaning "to sell in commerce, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce." The Commission relies principally on the third prong of this definition, arguing that the tramway is "held for sale or distribution after introduction into commerce."[7] With respect to the argument that the tramway is held for sale by State Fair or S & S, however, it must be remembered that the consumer product in this case is the tramway itself and not the licenses (tickets) which allow passengers to be transported on the tramway. The latter are not "articles" within the meaning of 15 U.S.C. §2052(a)(1), since they constitute no more than "an abstract right to occupy an amusement device." *See Albert v. State*, 80 Misc.2d 105, 362 N.Y.S.2d 341, 344 (Ct.Cl. 1974), *aff'd* 51 A.D.2d 611, 378 N.Y.S.2d 125 (1976). It is undisputed that

[7] Since the tramway was manufactured in Switzerland and imported into the United States several years before it came into the hands of State Fair, it cannot seriously be contended that State Fair is holding the tramway itself for introduction into commerce or for delivery for introduction into commerce. The concept of introduction into commerce or delivery for introduction into commerce denotes the first transportation of a product in interstate commerce or the delivery of a product for its first transportation in interstate commerce. These functions were accomplished at the time the tramway was imported into the United States.

State Fair has no intention of selling the physical equipment which comprises the tramway to anyone.

The question thus becomes whether or not State Fair and S & S are holding the tramway for distribution after introduction into commerce within the meaning of § 2052(a)(11). Neither the Act nor its legislative history provide substantial guidance as to the meaning of the phrase "to hold for distribution after introduction into commerce." A mechanical reapplication of the definition of "distribution in commerce" in § 2052(a)(11) would lead to the circular result that the phrase means "to hold for sale in commerce, to hold for introduction or delivery for introduction into commerce, or to hold for sale or distribution after introduction into commerce." Hence it is necessary to give a broader definition to the term distribution than is contained in that section. The concept of distribution, as that term is used in a generic sense, does generally involve a transfer of possession or control over an object. One does not ordinarily speak of a product being "distributed" when it is merely made available for public use without such a transfer. In this case, neither possession no control of the tramway ever passes to consumers. A passenger on a Skyride never controls the Skyride; instead, he or she merely sits passively in the gondola of the tramway.* Nor can the passenger be said to possess the ride in any way, any more than a patron in a theater can be said to possess the seat from which he

* While the concept of consumer control is only marginally relevant to the definition of a "consumer product," *Chance, supra*, at 233, it is intimately related to the ordinary definition of "distribution." Thus the statement of the court in *Chance* that "the legislative history of the Act nowhere suggests that Congress intended to import a 'control' requirement into the definition of the term 'consumer product'" is fully consistent with this analysis. There the court was considering the definition of consumer product; here the court must analyze the concept of distribution.

watches the performance.[9] Because neither possession nor control of the tramway passes to the consumer, State Fair and S & S do not distribute the ride, and cannot be said to hold the ride for distribution after introduction into commerce.

If Congress had intended the mere leasing or licensing of a product to constitute distribution in commerce, Congress could have easily done so as explicitly as in its definition of "consumer product." While Congress, during the legislative process, specifically altered the definition of "consumer product" to include products produced for use by consumers (and hence including those products which are leased or provided without charge), Note, *supra*, 43 Geo.Wash.L.Rev. at 1082-83; H.R.Rep.No. 1153, 92d Cong., 2d Sess. 27 (1972); H.R.Rep.No. 1593, 92d Cong., 2d Sess., *reprinted in* [1972] U.S.Code Cong. & Admin.News, pp. 4596, 4629, it did not add corresponding language to the "manufactured or held, in connection with distribution in commerce" language of § 2065(a)(1) or the definitions of "distributor" or "distribution in commerce" in §§ 2052(a)(5) and 2052 (a)(11), respectively. This court ought not broaden the inspection authority beyond that palpably signaled by Congress.

[13] A similar analysis must be undertaken with respect to the language of 15 U.S.C. § 2065(a)(2), which permits *inspection* of consumer products within the areas the Commission may *enter* pursuant to § 2065(a)(1). The Commission argues that the former seciton, which speaks of areas where products are held, without the constraints of a "distribution in commerce" requirement, provides an indepen-

[9] To carry this analogy even further, can an observer in a courtroom be said to possess the seat from which he observes the proceedings? Is it possible that Congress could have intended that the courtroom seat — which occasionally may be repaired by those who maintain the court facility — be considered as "manufactured" by the court and "held for distribution in commerce" by the courts?

dent and more expansive grant of authority to the Commission. To read § 2065(a)(2) in such a manner, however, would render § 2065(a)(1) superfluous. Section 2065(a)(2), which speaks of "*such* factory, warehouse, or establishment" (emphasis supplied) must necessarily be held to relate back to § 2065(a)(1) for a determination of which factories, warehouses, and establishments are encompassed within the provisions of the second subsection. Thus the "in connection with distribution in commerce" requirement, while not appearing directly in § 2065(a)(2), is engrafted onto that section through its relationship with § 2065(a)(1).

The conditions under which the Commission may inspect books and records relating to consumer products, as distinguished from the products themselves, are set forth in § 2065(b). Under that section, the Commission is entitled to inspection if State Fair is a "manufacturer, private labeler, or distributor" of a consumer product. "Manufacturer" is defined by § 2052(a)(4) to mean one who manufacturers or imports. "Private labeler" is defined as "an owner of a brand or trademark on the label of a consumer product which bears a label." 15 U.S.C. § 2052(a)(7)(A). Finally, "distributor" is defined by § 2052(a)(5) as "a person to whom a consumer product is delivered or sold for purposes of distribution in commerce."

The arguments that State Fair has manufactured the tramway, or is distributing it in commerce, have already been discussed at length and rejected insofar as the record before this court permits. That record also indicates that State Fair did not import the tramway, and instead purchased it from a domestic owner several years after its importation. Thus the argument turns on whether State Fair is a "private labeler" under the Act.

The Commission argues that State Fair is the owner of the trademarks "Skyride" and "Swiss Skyride," based on a

1971 agreement between State Fair and the previous owner of the tramway which purports to assign those trademarks to State Fair as part of State Fair's purchase of the ride itself. We find that the Commission has yet to provide sufficient evidence to show that State Fair ought to be considered a "private labler." Even if these terms are regarded as brands or trademarks owned by State Fair, the legislative history of the Act raises questions concerning whether State Fair is encompassed within the term "private labeler": "a 'private labeler' is defined to mean an owner of a brand or trademark which is placed on a consumer product *in lieu of* that of the manufacturer's [sic]." H.R.Rep.No. 1153, 92d Cong., 2d Sess. 28 (1972) (emphasis supplied). The House Report further indicates that the focus of the private labeler definition involves "a person [who] holds himself out as manufacturing a product and standing behind the product's quality or performance." *Id.* Little or no evidence of the nature of the labeling on the aerial tramway has been offered and the court is not able to determine State Fair's status as a "private labeler" on the record before it.

V. SUMMARY.

Two vital considerations are at stake in disputes involving administrative investigations. On the one hand, the public interest might be served by the efficiencies of unfettered probes into the lives of subject individuals or organizations. On the other hand, the multitudinous facets of the right to be let alone are not merely classroom ideals but are core constitutional concepts.

These considerations manifest themselves in the applicable law. For example, while the legislative history clearly demonstrates that Congress intended as broad as possible a definition of consumer products within the scope of the Commission's jurisdiction, Congress was careful enough to

provide that those products which meet the Act's definition are not subject to inspection regardless of their location or ownership. Hence we find the tramway is indeed a "consumer product," but we also find that the Commission has not yet shown it can inspect the ride in the hands of State Fair and S & S. The dangers of excessive government interference are minimized at little loss of efficiency through the Commission's use of the more limited modes of investigation for which Congress has expressly provided. In this fashion, the Commission can generate the information which may make it possible for a court to be sure that the broader search made possible by a warrant is permissible.

[14] An administrative agency vested by Congress with investigative and inquisitorial powers must be allowed to first determine if a product or firm is within its congressional charge except in those cases, hopefully few in number, when jurisdiction is obviously absent. *Leedom v. Kyne, supra.* That principle of administrative law is long established and is here again affirmed. It will allow the Commission to proceed with an extensive array of investigative devices including, for example, in the case of administrative subpoenas, the enforcement power of the courts, all without having the investigative process nipped in its infancy by jurisdictional hairsplitting. To apply this deferential standard to the issuance of warrants would further limit the already limited interpositional role of the magistrate and denigrate a firm's right of privacy.

To be sure, allowing an administrative agency to first determine its own jurisdiction may impose expense upon those subject to investigation and inconvenience them — all without a showing that "jurisdiction" is present. The corresponding benefits of this jurisdiction-to-determine-jurisdiction, on the other hand, include the avoidance of slowing the inquisitorial process and other by-product values such

as agency maturation and self-discipline as well as extra-judicial dispute resolution.

In summary, the Commission's jurisdiction here is not so plainly absent that it cannot proceed with all its investigative tools except entry and seizure for which an administrative warrant is required. It adds little to argue that these rides ought to be investigated in the public interest. Of course that is true, but that assertion hardly answers the question of who ought to investigate.

Having dealt at length with the intricacies of this case, one final general observation is in order. Government has long required a hunter to produce his license on request when found in hunting fields. Poaching of all kinds has always been regarded as unacceptable. With the individual's right to privacy and the accountability of governmental agencies on the list of endangered species, it would seem anomalous not to require a federal agency to produce its license from Congress when it hunts. This opinion does no more than that.

Three consolidated actions are now pending before the court. In No. 3-79-132M, the motion to quash the *ex parte* administrative inspection warrant is GRANTED without prejudice to future application for a warrant should the Commission's investigation, otherwise conducted, develop facts sufficient to support a finding that the Consumer Safety Product Act is applicable both to the product and to the firm to be inspected. The motion for an order requiring State Fair and S & S to show cause why they should not be held in contempt is DENIED. In Nos. CA-3-79-1367-G and CA-3-79-1388-G, the remaining prayers for injunctive relief are DENIED. The respective plaintiffs are granted and denied declaratory relief in conformity with the foregoing opinion. Judgments will be entered accordingly.

APPENDIX B

The STATE FAIR OF TEXAS,
Plaintiff-Appellant, Cross-Appellee,

Steck & Stapf Attractions, Inc.,
Plaintiff-Appellant, Cross-Appellee,

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION,
Defendant-Appellee, Cross-Appellant.

No. 80-1006.

United States Court of Appeals,
Fifth Circuit.
Unit A

June 30, 1981.

In consolidated action to determine authority of Consumer Product Safety Commission, under administrative inspection warrant, to inspect aerial tramway at Texas State Fair, the District Court, Patrick E. Higginbotham, J., found that tramway was a consumer product, but that Commission had not presented sufficient facts establishing authority to enter premises and cross appeals were taken. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) aerial tramway was a "consumer product" within meaning of Consumer Product Safety Act, and (2) Commission was authorized to enter fairgrounds to inspect aerial tramway and relevant documents.

Affirmed in part, vacated in part and reversed in part.

Ainsworth, Circuit Judge, dissented and filed opinion.

1. Consumer Protection

To justify issuance of administrative search warrant, Consumer Product Safety Commission must make some showing that it has statutory authority to conduct investigation. Consumer Product Safety Act, § 16(a), 15 U.S.C.A. § 2065(a).

2. Searches and Seizures

Fourth Amendment's prohibition of unreasonable searches and seizures applies to administrators as well as criminal investigations. U.S.C.A.Const. Amend. 4.

3. Consumer Protection

In order to obtain warrant for documents, Consumer Product Safety Commission was required to demonstrate clear, not merely plausible, statutory authority.

4. Evidence

In consolidated action to determine authority of Consumer Product Safety Commission to inspect aerial tramway, Court of Appeals would take judicial notice that some of the machinery could be shielded or enclosed for safety or functional purposes.

5. Consumer Protection

In order to obtain warrant to search aerial tramway, Consumer Product Safety Commission was required to demonstrate that warrant was not plainly incompetent to any lawful purpose.

6. Consumer Protection

Aerial tramway at state fair was an article, was distributed, was used by consumers and was used in recrea-

tion, and therefore, was a "consumer product" within meaning of Consumer Product Safety Act. Consumer Product Safety Act, §§3(a)(1)(A), 3(a)(1)(ii), 15 U.S.C.A. §§ 2052(a)(1)(A), 2052(a)(1)(ii).

See publication Words and Phrases for other judicial constructions and definitions.

7. Statutes

Ordinarily, treatment of statutory language as surplusage is avoided.

8. Statutes

Two acts with different purposes need not be construed in pari materia.

9. Statutes

Statute governs all circumstances falling within its purview, not only those that prompted its enactment.

10. Consumer Protection

Consumer Product Safety Commission was authorized by Consumer Product Safety Act to enter fairgrounds to inspect aerial tramway and relevant documents. Consumer Product Safety Act, §§3(a)(8), 16(a), (a)(2), 15 U.S.C.A. §§ 2052(a)(8), 2065(a), (a)(2).

Appeals from the United States District Court for the Northern District of Texas.

Before GOLDBERG, AINSWORTH and RUBIN, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Among the attractions offered visitors to the State Fair of Texas is the opportunity to take a trip on the "Swiss Skyride." Skyride passengers travel in open gondolas, moving along a single cable, over the fairgrounds and enjoy a panoramic prospect. The Skyride is owned by the State Fair, but operated by Steck & Stapf Attractions, a lessee. Manufactured in Switzerland by Van Roll, Ltd., the attraction has been bought by several amusement parks around the country.

Two recent Skyride accidents, one occurring at the State Fair, prompted the United States Consumer Product Safety Commission to obtain an administrative search warrant authorizing an on-site inspection of the Skyride and an examination of relevant documents in the possession of the Fair and Steck & Stapf. The Fair and Steck & Stapf sued to prevent the Commission from conducting its investigation. Concluding that the Skyride is a "consumer product" within the meaning of the Consumer Product Safety Act, we uphold the Commission's authority to conduct the investigation.

I.

The accident at the State Fair occurred on October 21, 1979. Four gondolas collided, falling to the ground and killing one passenger. A similar accident at a Missouri amusement park had caused three fatalities and led to an investigation of this type of ride by the Consumer Product Safety Commission. As part of its investigation, the Commission served the State Fair with a notice of inspection [*see* 16

C.F.R. § 1118.2 (1980)] seeking access to the Skyride and to relevant records. The State Fair and Steck & Stapf allowed a Commission engineer to view the ride from a distance, but would not allow him to inspect it more closely or to examine the documents.

To prevent further action by the Commission, the State Fair and Steck & Stapf filed separate suits, later consolidated, seeking a declaratory judgment that the Skyride is not a "consumer product" and, therefore, beyond the Commission's jurisdiction. They also sought an injunction against further Commission attempts to inspect the ride. Holding that no irreparable injury was threatened until the Commission obtained a search warrant enabling it to disregard the plaintiffs' refusal to cooperate, the district court held that the controversy was not yet ripe for judicial decision. The court retained jurisdiction, anticipating the search warrant that was later issued by a federal magistrate. When they again refused to permit inspection, the Commission sought an order to show cause why it should not be permitted to conduct the inspection as the warrant authorized.

The district court affirmed the magistrate's denial of the injunctive relief sought by plaintiffs. In all other respects, however, plaintiffs were granted the relief sought. The district court affirmed the denial of the Commission's motion for an order to show cause, granted the plaintiffs' motion to quash the warrant, and entered a declaratory judgment in favor of plaintiffs. Plaintiffs' victory was nonetheless partial. The court held that the Skyride is a consumer product under the Act and granted plaintiffs relief only because the Commission had not presented sufficient facts establishing authority to enter the premises. *See* 15 U.S.C. §2065(a). The Commission could thus continue its investigation, although at a distance.

Neither side is content with this decision.[1] State Fair and Steck & Stapf challenge the characterization of the Skyride as a consumer product, while the Commission argues that it has authority to inspect the premises and records.

II.

[1] To justify issuance of an administrative search warrant, the Commission must make some showing that it has statutory authority to conduct the investigation. Relying on *Marshall v. Barlow's Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), the district court concluded that the Commission "must be able to demonstrate its own jurisdiction." *State Fair of Texas v. United States Consumer Product Safety Commission*, 481 F.Supp. 1070, 1076 (N.D.Tex.1979). The Commission, citing pre-*Barlow's* cases, argues that a reviewing court should assure itself only that statutory authority for the warrant is not obviously lacking. *See American General Insurance Co. v. F. T. C.*, 496 F.2d 197, 200 (5th Cir. 1974).

[2] The Fourth Amendment's prohibition of unreasonable searches and seizures applies to administrative searches as well as criminal investigations. *Donovan v. Dewey*, _____ *U.S.* _____, *101 S.Ct.* _____, *68 L.Ed.2d* _____, 49

[1] The judgment is final and appealable. The district court's statement that its dismissal of the Commission's suit was "without prejudice to further application for a warrant under other circumstances," *State Fair of Texas v. United States Consumer Product Safety Commission*, 481 F.Supp. 1070, 1082 (N.D.Tex.1979), holding out the possibility of a subsequent suit unhindered by *res judicata*, did not rob the judgment entered of its finality in resolving all of the issues then before the court. *Cf. F. T. C. v. Texaco, Inc.*, 517 F.2d 137, 143 n.6 (D.C.Cir.1975), *cert. denied*, 431 U.S. 974, 97 S.Ct. 2939, 53 L.Ed.2d 1072 (1977), holding that the mere possibility of reconsideration upon presentation of additional facts does not rob a judgment already entered of finality. *Compare Broussard v. Lippman*, 643 F.2d 1131 (5th Cir. 1981), in which a district court order was held not final because it predicated entry of judgment upon the occurrence of a condition precedent.

U.S.L.W. 4748 (June 17, 1981); *Marshall v. Barlow's Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978); *See v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967). *See Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). In *Barlow's*, the Court held that, except in unusual circumstances, warrantless searches of commercial premises are inherently unreasonable and, therefore, interdicted by the Fourth amendment. To secure a warrant, the agency must show "probable cause" that it should be issued. As Justice White noted, "[p]robable cause in the criminal sense is not required," 436 U.S. at 320-21, 98 S.Ct. at 1824, 56 L.Ed.2d at 316, but the agency must show that:

> the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria.

Id. at 323, 98 S.Ct. at 1826, 56 L.Ed.2d at 318. The plaintiffs contest only the Commission's statutory authority and do not challenge the constitutionality of the search or the existence of an appropriate administrative plan.

In deciding whether the district court properly granted plaintiffs' motion to quash the warrant, we must determine what showing of statutory authority is sufficient to justify issuance of a warrant. As with most Fourth Amendment issues, we determine the applicable standard by weighing the legitimate expectations of privacy regarding the object of the search against the level of intrusion on that privacy. *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *Wanger v. Bonner*, 621 F.2d 675 (5th Cir. 1980).[2]

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[2] *See Donovan v. Dewey*, — U.S. —, 101 S.Ct. —, 68 L.Ed.2d —, 49 U.S.L.W. 4748 (June 17, 1981); *Marshall v. Barlow's Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978); *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

It follows that the balance may be different depending on the kind of property that is to be searched, the place where it is located, and the degree of intrusiveness the search entails. We put different considerations on the scales when we consider the examination of private papers and the inspection of property that is usually in plain view.

[3] Both plaintiffs have a significant privacy interest in the documents that are in their respective possession because these materials are kept in a private file away from public view. We agree with the district court that a search warrant is "the most disruptive of the arrows in this investigatory quiver," *State Fair of Texas v. United States Consumer Products Safety Commission*, 481 F.Supp. at 1076, because the warrant would enable the inspectors to search these files for themselves. Accordingly, we hold that, in order to obtain a warrant for the documents, the Commission must demonstrate clear, not merely plausible, statutory authority.

[4,5] Unlike the documents, the Skyride stands entirely visible to the public. What is in "plain view" receives little or no Fourth Amendment protection because the owner's expectation of privacy is minimal. *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *United States v. Jonas*, 639 F.2d 200 (5th Cir. 1981). *See Donovan v. Dewey*, _____ U.S. _____, 101 S.Ct. _____, 68 L.Ed.2d _____, 49 U.S.L.W. 4748 (June 17, 1981) (Rehnquist, J., concurring). The Commission seeks only to examine the Skyride machinery more closely than a fairgoer could. We take judicial notice that some of the machinery may be shielded or enclosed for safety or functional purposes but the record contains no evidence that it is purposely hidden from public view. In the absence of a command to shut down the ride's operation, a warrant to examine its machinery has little disruptive effect on the owner's business and

strips little, if any, secrecy cloak.[4] Inspection of the Skyride, is, therefore, governed by the lesser standard: a warrant to inspect premises shielded by a minimal privacy interest need only be not "plainly incompetent to any lawful purpose." *See Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509, 63 S.Ct. 339, 343, 87 L.Ed.2d 424, 429 (1943).

III.

The provisions of the Consumer Product Safety Act, 15 U.S.C. § 2051 *et seq.* determine the Commission's authority to obtain a warrant to inspect the relevant documents. Concluding that the Commission clearly proved its statutory authority to conduct this search under the demanding standard applicable to the documents, we do not test its authority by the lesser standard applicable to the Skyride.

A. THE SKYRIDE IS A CONSUMER PRODUCT

The Act covers more than toasters and other small household appliances. Congress defined the term "consumer product" expansively to include any article, or component part thereof, produced or distributed

(i) *for sale* to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or

(ii) *for the personal use*, consumption, or enjoyment of a consumer in or around a permanent or temporary

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[4] *Barlow's*, *See* and *Camara* all involved premises where the owner had a high expectation of privacy. *Barlow's* involved the company's "working area"; *See*, a warehouse; and *Camara*, an apartment. Our situation is analogous to an exception discussed in *Barlow's* and applied in *Donovan v. Dewey*. Like a pervasively regulated corporation, the owner and operator of the Skyride have consented to the constant examination of their premises by outsiders.

> household or residence, a school, in recreation, or otherwise; ....[4]

15 U.S.C. § 2052(a)(1) (emphasis supplied). The statute thus embraces not only merchandise produced "for sale to a consumer," but also those articles that consumers do not ordinarily buy, but nonetheless use. The hallmark of the Commission's authority is not the customer's legal relation to a product, but the consumer's physical exposure to it. *See* H.R.Rep.No.92-1153, 92d Cong., 2d Sess. 27 (1972); *Consumer Product Safety Commission v. Chance Manufacturing Co.*, 441 F.Supp. 228, 233 (D.C.D.C.1977).

The term "personal use" is, of course, modified. The article must be produced for use "in or around a ... household or residence, a school, in recreation or otherwise." When the entire second paragraph of the definition is read literally, it encompasses the Skyride; the Skyride is an "article ... produced or distributed ... for the personal use ... or enjoyment ... of a consumer ... in recreation." The House Report accompanying the Act substantiates this interpretation. It states that Subpart (ii) "also" includes:

> products which are primarily or exclusively sold to industrial or institutional buyers ... so long as they were produced for the *use* of consumers.

H.R.Rep.No.92-1153, 92 Cong., 2d Sess. 27 (1972) (emphasis and ellipsis in the original).

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[4] The statute then lists nine classes of exceptions to this inclusive language. *See* 15 U.S.C. § 2052(a)(1)(A)—(I).

Of course, plaintiffs challenge this reading,[5] but we cannot ignore the usual significance of the language employed, the legislative history of subpart (ii) and the broad remedial policy underlying the Act.

1. The Skyride is an "Article"

[6] Steck & Stapf argues that the Skyride is not an "article" because it is too large to be exchanged between consumers. The only authority cited to support this extremely limited interpretation is *Webster's* definition of an article as a "commodity." *Webster's New World Dictionary* 42 (1969). If *Webster's* definition is controlling, it designates the Skyride. The Skyride is certainly a commodity, a tangible item capable of being sold. Moreover, *Webster's* also defines commodity as "article of commerce." If there be a distinctive difference between the words, we are unable to discern it. That Congress found it necessary to exempt aircraft and boats from the definition of consumer product. 15 U.S.C. § 2052(a)(1)(F)-(G), indicates that size is not a

[5] The complexity of this issue may be inferred from the lack of consensus among those judges who have already considered it. Two judges have decided that the Skyride, is a consumer product and a third would reach the same conclusion. *See Robert K. Bell Enterprises, Inc. v. Consumer Product Safety Commission*, 484 F.Supp. 1221 (N.D.Okl.1980), *rev'd*, 645 F.2d 26 (10th Cir. 1981) (Wienshienk, J., dissenting); *State Fair of Texas v. United States Consumer Product Safety Commission*, 481 F.Supp. 1070 (N.D.Tex.1979), *rev'd on other grounds* herein. *See* also *Consumer Product Safety Commission v. Chance Manufacturing Co.*, 441 F.Supp. 228 (D.C.D.C.1977), holding that the "Zipper," an amusement park ride, is a consumer product. Three judges have held that the Skyride is not a consumer product. *See* majority opinion of two judges in *Robert K. Bell Enterprises, Inc. v. Consumer Product Safety Commission*, 645 F.2d 26 (10th Cir. 1981); *Walt Disney Productions v. United States Consumer Product Safety Commission*, No. 79-0170-LEW(Px) (S.D. Cal. April 18, 1979), *rev'd on other grounds*, No. 80-1006 (9th Cir. May 4, 1981).

defining limitation to the term "article."[6] Be it ever so large, the Skyride is an article.

2. The Skyride is "Distributed"

The State Fair contends that the Skyride is not "distributed" because it is not customarily sold directly to consumers. This argument is answered by the words of the provision to which the Fair alludes. Section 2052(a)(1)(A), describing the first of the nine excepted classes of products excludes from the Commission's authority:

> any article which is *not customarily* produced or *distributed for* sale to, or *use* or consumption by, *or enjoyment of*, a consumer. (Emphasis supplied)

15 U.S.C. § 2052(a)(1)(A). We have no cause to ignore the unaccommodating words italicized; the Skyride has been "customarily" distributed — to amusement parks — for "use ... or enjoyment of" consumers.

ASG Industries, Inc. v. Consumer Product Safety Commission, 593 F.2d 1323 (D.C.Cir.1979), *cert. denied*, 444 U.S. 864, 100 S.Ct. 133, 62 L.Ed.2d 87 (1979), and *Consumer Product Safety Commission v. Anaconda Co.*, 593 F.2d 1314 (D.C.Cir. 1979), cited by the State Fair, are not to the contrary. Each turns on the court's conclusion that housing is not a consumer product. *ASG* involved architectural glazing materials, while *Anaconda* involved aluminum wiring circuits, both products incorporated into housing. Consumers do not "use" these products until they have been incorporated into the exempted structure and are no longer used separately from their use as part of the whole. In both

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[6] The Congressional purpose in using "article" was identified by Judge Leventhal in *Consumer Product Safety Commission v. Anaconda Co.*, 593 F.2d 1314, 1319 (D.C.Cir.1979):

> Congress contemplated an object produced or distributed as a distinct article of commerce, rather than any physical entity that might exist only at an intermediate stage of production.

cases, however, Judge Leventhal noted that products "customarily ... used by consumers" are not exempted. *ASG*, 593 F.2d at 1328; *Anaconda*, 593 F.2d at 1322. *See Kaiser Aluminum & Chemical Corp. v. United States Consumer Product Safety Commission*, 574 F.2d 178 (3d Cir. 1978), *cert. denied*, 439 U.S. 881, 99 S.Ct. 218, 58 L.Ed.2d 193 (1978).[7]

The language of Section 2052(a)(1)(A) is unambiguous. *ASG*, *Anaconda* and *Kaiser* confirm that a product customarily distributed for use by consumers is not exempt from the Commission's authority.

3. The Skyride is Used by Consumers

The statutory phrase "for the personal use, consumption or enjoyment of the consumer" poses perhaps the most difficult question of interpretation raised by the congressional definition of consumer product. In the common sense of the word, consumers "use" the Skyride, in that they "enjoy, hold, occupy, or have some manner of benefit" from the product. *Black's Law Dictionary* 1710 (4th ed. 1968) (defining "Non-technical Sense"). *See* 2 E. Weekly, *An Etymological Dictionary of Modern English* 1574 (1967). Taking the term as defined in *Webster's Seventh New Collegiate Dictionary* 978 (1965), a common desk-top reference book, the passenger "avail[s] oneself of" the ride, for "use implies availing oneself of as a means to an end." Not only do passengers liberally occupy the Skyride, but they also enjoy it for sightseeing and benefit from being transported.

Steck & Stapf argues that, because consumers do not exercise control over the particular gondola in which they ride, they do not "use" the Skyride. Surprisingly, two

[7] In *Kaiser*, the Third Circuit, using a different analysis, held that aluminum wiring circuits were customarily used by consumers and were not excepted under Section 2052(a)(1)(A).

courts have accepted this argument. *See Robert K. Bell Enterprises, Inc. v. Consumer Product Safety Commission*, 645 F.2d 26, 29 (10th Cir. 1981); *Walt Disney Productions v. United States Consumer Product Safety Commission*, No. 79-0170-LEW(Px), slip op. at 6 (C.D. Cal. April 18, 1979), *rev'd on other grounds*, No. 79-3435 (9th Cir. April 22, 1981). Neither opinion cites any legislative history to support such a narrow and unusual reading of "use" in contradiction to the common understanding of its meaning. One court has found that no evidence supports their interpretation. *Consumer Product Safety Commission v. Chance Manufacturing Co.*, 441 F.Supp. 228, 233 (D.C.D.C.1977).

If we created this requirement *sua sponte*, we would also ignore that portion of the House Report including as consumer products those products sold to institutions for the use of consumers. The power of consumers to control articles sold to and owned by an institution will usually be limited.* Precisely because they cannot control the product, consumers may face even greater risks of injury. It certainly becomes more difficult for them to determine for themselves the risks posed by its use. In the absence of any evidence of a contrary congressional intent, we cannot assume that Congress excluded products falling within the language of the statute and contemplated by the legislative history.

[7] We are more troubled by an apparent redundancy in the definition. We find it difficult to imagine a product "sold" to consumers, but not "used" by them.* Even the

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* Consider, for example, a glass basketball backboard sold only to schools and arenas. Players have no "control" over the backboard, yet face a significant risk of injury if the glass plate shatters easily.

* In *ASG* and *Anaconda*, Judge Leventhal found that homeowners did not directly use architectural glazing materials and aluminum circuits sold to the homebuilder. In holding that consumers customarily bought the former and remanding for a finding whether they used the latter, he did not negate the possibility that consumers who bought these products used them.

restrictive definitions urged by State Fair and Steck & Stapf do not eliminate this redundancy. Ordinarily, we avoid treating statutory language as surplusage. *Ideal Mutual Insurance Co. v. C. D. I. Construction Inc.*, 640 F.2d 654, 658 n.7 (5th Cir. 1981). In this instance, however, Congress may have tolerated tautology. The Senate version of the Consumer Product Safety Act limited its definition to products "sold" to consumers.[10] The House bill also used the language now constituting subpart (i), but added the additional language regarding "personal use" embodied in subpart (ii).[11] In its desire for "an assurance of comprehensiveness," *ASG Industries*, 593 F.2d at 1328, the House employed its more "broadly stated" definition, H.R. Rep.No.92-1153, 92d Cong., 2d Sess. 27 (1972), without considering to what degree it overlapped the Senate definition. *See id.* The effort to avoid lacunae by seeking embraciveness may easily result in overlapping coverage. Without any evidence that Congress, in passing the House version, intended "sold" to have independent significance, we decline to fabricate a tortured distinction.

4. The Skyride is Used in Recreation

Both plaintiffs assert that the Skyride is used only as a means of transportation, not as a form of recreation. The district court found that the ride was "intended for the enjoyment of recreation-minded consumers." 481 F.Supp. at 1077. Plaintiffs have not shown that this finding is clearly erroneous. *See Robert K. Bell Enterprises, Inc. v. United States Consumer Product Safety Commission*, 484 F.Supp. 1221, 1225 (N.D.Okl.1980), *rev'd on other grounds*, 645 F.2d

[10] S. 3419, 92d Cong., 2d Sess. § 101 (1972). The district court in *Walt Disney Productions* erroneously relied on the report accompanying this bill. *See* slip op. at 5, *citing* S.Rep.No.92-835, 92d Cong., 2d Sess., U.S.Code Cong. & Admin.News 1972, 4573 (1972).

[11] H.R. 15003, 92d Cong., 2d Sess. § 3.

26 (10th Cir. 1981), which quotes promotional literature describing the Skyride as "an attraction in itself."

The plaintiffs then pose a more challenging argument. They construe "in recreation" to modify the immediately preceding language rather than to provide an additional basis for considering an item as a consumer product. The relevant portion of Section 2052(a)(1)(ii) states that a consumer product is used, enjoyed or consumed:

> in or around a permanent or temporary household or residence, a school, in recreation, or otherwise ...

This interpretation reads the phrase "in recreation" to refer only to household or school products used "in recreation [ ] or otherwise." Plaintiffs urge that, if "in recreation" provides an independent basis whereby a product becomes "consumer," then the word "otherwise" also provides an independent basis whereby the statute includes every product imaginable. (Plaintiffs provide a parade of spectres for our edification.) Further, according to the plaintiffs, the references to "household or residence" would be rendered surplusage, subsumed by "otherwise."

With the court in *Chance Manufacturing*, we find this interpretation "unduly strained." 441 F.Supp. at 233. The insertion of a comma after "recreation" indicates that the word was part of the preceding series, rather than functioning with "otherwise" as an independent adjectival phrase and thus limiting "consumer products" to those used in recreation or otherwise in a household, residence or school. Further evidence that use "in recreation" provides a separate basis for including a product comes from the list of exceptions to Section 2052(a)(1)'s definition of "consumer product." That Congress explicitly exempted aircraft and boats, *see* 15 U.S.C. § 2052(a)(1)(F)-(G), indicates congressional belief that these products, having no connection

with school or household, would otherwise have fallen within the general definition.

We imply no insight as to the precise meaning of the term "otherwise" in this context. As a matter of diction, it is not redundant with the items in the preceding series because, by definition, it refers only to "other" items. However, we are not required to read this statute as if it were a wonderfully constructed jig-saw puzzle, with each word having only one precise place, yielding, when assembled, an unambiguous picture. The statute was not so constructed, as the legislative history indicates. It seems likely that "otherwise" was inserted as "an assurance of comprehensiveness," to use Judge Leventhal's phrase. *ASG*, 593 F.2d at 1328. This case does not require us to announce that any non-industrial product[12] posing hazards to individuals constitutes a consumer product. That issue is simply not before us because the Skyride falls within one of the stated bases of the Commission's jurisdiction.

5. Other Statutory Provisions Do Not Compel Plaintiffs' Interpretation

The Act authorizes the Commission to acquire free samples of imported consumer products and purchase domestic consumer products at cost. *See* 15 U.S.C. § 2066, 2076. Steck & Stapf argues that, because the Commission is unlikely to acquire the Skyride in either manner, the ride is not a consumer product.[13] We find this argument unpersuasive. Both sections are permissive; they enable the Commission to obtain sample products, but do not suggest that the

[12] *See* H.R.Rep.92-1153, 92d Cong., 2d Sess. 27, stating that "industrial products" are excluded.

[13] This argument found favor in California. *See Walt Disney Productions v. United States Consumer Product Safety Commission*, No. 79-0170-LEW(Px), (S.D.Cal. April 18, 1979) *rev'd on other grounds*, No. 80-1006 (9th Cir. May 4, 1981).

Commission's jurisdiction is limited to products that it may thus acquire. Such a limitation would be puzzling. The Commission will usually be fiscally unable to acquire products as expensive or as large as the Skyride. Yet large and costly products pose hazards to consumers indistinguishable from the hazards posed by those that are small and inexpensive.[11] Absent legislative history or other explicit evidence that Congress intended this distinction, we refuse to read it into the statute.

[8] Both plaintiffs argue that the narrower definition of "consumer product" in the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*, controls the definition contained in Section 2052(a)(1). The Warranty Act defines consumer product "for the purposes of this chapter" as:

> tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes.

15 U.S.C. § 2301(1). Unlike the Consumer Product Safety Act, the Warranty Act is concerned with fraud, the release of financial information, and contractual rights. Because the Warranty Act is concerned only with household products actually sold to consumers, Congress consciously chose to employ a more limited definition. Two acts with different purposes need not be construed *in pari materia*. *United Shoe Workers v. Bedell*, 506 F.2d 174, 188-89 & n.96 (D.C.Cir.1974); *Latimer v. Sears, Roebuck & Co.*, 285 F.2d 152, 157 (5th Cir. 1960).

Steck & Stapf also cites definitions of "consumer product" in the Fair Packaging and Labeling Act, *see* 15 U.S.C. 1459(a), and the Energy Policy and Conservation Act, *see* 42

[11] That Congress found it necessary to exempt airplanes from Section 2052(a)(1)'s definition of consumer product suggests that neither cost nor size, of themselves, exclude a product.

U.S.C. § 6291(a)(1). In each of these statutes, Congress has chosen to use the same term, "consumer product," but to define it differently in each instance. Each definition reflects the basic concerns of the legislation in which it is found. Without any evidence that these different definitions are interrelated, we refuse to assume that each of these different definitions has the same meaning. Indeed, if we did, we would have difficulty deciding which definition controls the others. We conclude that none of the provisions suggested by plaintiffs would limit Section 2052(a)(1)'s definition of "consumer product."

6. The Legislative History of the Act Does Not Exclude the Skyride

[9] Both plaintiffs rely on legislative history indicating that Congress was concerned with the hazards posed by small household products to argue that Congress was concerned only with small products. *See, e.g.*, 118 Cong.Rec. 21847 (1972) (remarks of Sen. Percy); *id.* at 31375 (remarks of Cong. Staggers). Without doubt, many congressmen spoke primarily in terms of small household products when discussing the Act. Their statements, while addressing a central concern, do not purport to describe the limits of the Act's reach. The language of Section 2052(a)(1) suggests a much broader scope. A small facet of a larger problem will frequently capture the attention of Congress. Even though much of its discussion may involve the aspect that initially gained congressional attention, Congress, in the end, frequently passes a statute dealing comprehensively with the larger problem.[15] Lacking specific evidence that the expan-

[15] Section 1983 of the Civil Rights Acts, 42 U.S.C. § 1983, provides an illustration of the paradigm. Although enacted in response to persecution of blacks during Reconstruction, it applies to every deprivation of constitutional rights under color of state law. *See, e. g., Mitchum v. Foster*, 407 U.S. 225, 238-242, 92 S.Ct. 2151, 2160-62, 32 L.Ed.2d 705, 715-717 (1972); *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 402 (1961).

sion of Congressional concern embodied in Section 2052(a)(1)'s language is only apparent, we must give full effect to the language as written. A statute governs all of the circumstances falling within its purview, not only those that prompted its enactment.

We find the House Report statement that the statute includes "products sold to ... institutional buyers ... for *use* of consumers," quoted *supra*, more probative of congressional intent. Unlike the comments cited by the plaintiffs, this language deals directly with the limits of Section 2052(a)(1)'s definition of consumer product, as does the Report's exhortation that we construe the definition broadly. On balance, the legislative history favors the conclusion that the Skyride does not transcend the periphery of the Commission's expansive domain.

7. The Policy of the Act Favors Inclusion of the Skyride as a Consumer Product

In 15 U.S.C. § 2051, Congress specified the findings and purposes underlying the Act. These statements announce a broad remedial purpose. In addition, several bear specifically on the question before us. The primary justification for creating the Commission is expressed in the second finding.

> (a) The Congress finds that—
>
> (2) complexities of consumer products and the diverse natures and abilities of the consumers using them frequently result in an inability of users to anticipate risks and to safeguard themselves adequately.

15 U.S.C. § 2051(a)(2). If small household appliances pose risks beyond the ability of the average consumer to evaluate, a large and far more complicated machine like the Skyride may pose even greater hazards, yet consumers have

neither the technical expertise nor any real opportunity to evaluate the risks involved. In reality, only the institutional purchaser can effectively inquire into the risks posed by a product like the Skyride. The House Report statement that the statute includes products bought by institutions for consumer use indicates that Congress was unwilling to rely on the institutional buyer alone to ensure that consumers do not face unreasonable risks.

The fourth finding states that local government regulation of unreasonable risks posed by consumer products is "inadequate." 15 U.S.C. § 2051(a)(4). This disposes of plaintiffs' contention that Dallas Building Code regulations governing the Skyride exempt the product from the Commission's authority.[16]

The Act's "purposes" also favor inclusion of the Skyride.

> (b) The purposes of this chapter are—
>
> (1) to protect the public against unreasonable risks of injury associated with consumer products;
>
> (2) to assist consumers in evaluating the comparative safety of consumer products;
>
> (3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations;
>
> (4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.

15 U.S.C. § 2051(b). An effective Commission investigation improving the safety of the Skyride would serve each of these ends. The relevance of the fourth finding is especially obvious. Consumers have died while using the Skyride; the

[16] That the regulations are found in a building code does not transform the Skyride into a house. (In *Anaconda*, the court held that housing was not a consumer product under the Act. *See* 593 F.2d at 1320.) We take judicial notice that a Skyride is not a home.

protection of others who may use them cannot be assured by awaiting a personal injury action to determine fault. The manufacturers and owners whose products have already been involved in serious injuries to consumers bear an especially heavy burden in arguing that the Commission lacks jurisdiction.[17]

That burden has not been carried here. We hold that the Skyride is a "consumer product."

B. THE COMMISSION IS AUTHORIZED TO ENTER THE FAIR GROUNDS

The other statutory issue before us requires less explication. Section 2065(a)(2) of the Act authorizes the Commission

> to inspect, at reasonable times and in a reasonable manner such conveyance or those areas of such factory, warehouse, or establishment where such products are manufactured, held, or transported and which relate to the safety of such products.

15 U.S.C. § 2065(a)(2). Section 2052(a)(8) defines manufactured as "to manufacture, produce, or assemble." 15 U.S.C. § 2052(a)(8). The district court concluded that, because neither of the plaintiffs fabricated or assembled the product, the Commission was not authorized to enter their premises.

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[17] In *Walt Disney Productions v. United States Consumer Product Safety Commission*, No. 79-0170-LEW(Px) (S.D.Cal. April 18, 1979), *rev'd on other grounds*, No. 80-1006 (9th Cir. May 4, 1981), the district court saw the underlying policy considerations differently.

> Too expansive a reading of the Act's definition of a "consumer product" could result in the Commission spreading its limited resources too thinly, and might rob consumers of specialized agency expertise that Congress has attempted to guarantee.

Slip op. at 6-7. However, it is not the courts' prerogative to second-guess agency decisions properly within their discretion. *Oilfield Safety and Machine Specialties, Inc. v. Harman Unlimited, Inc.*, 625, F.2d 1248, 1254 (5th Cir. 1980). The Commission is the best judge of what it should accomplish with the means given it by Congress.

[10] Under the two sections, however, the Commission's authority depends not on who assembled (and thus "manufactured") the product, but on where the product was assembled. *Accord, Robert K. Bell Enterprises, Inc. v. Consumer Product Safety Commission*, 484 F.Supp. 1221, 1228 (N.D.Okl.1980), *rev'd on other grounds*, 645 F.2d 26 (10th Cir. 1981). Section 2065(a) speaks of "*areas* ... where such products are manufactured." The Skyride was necessarily assembled at the site of the fair, which provides the only location where the Commission may observe the product in action. Whenever a product can be assembled only on the purchaser's site, the Commission must either have the authority to inspect the functioning product there or be in most circumstances unable to inspect it at all. No legislative history mandates that we so limit the Commission's authority. We hold that the Commission may enter plaintiffs' premises to inspect the Skyride and to examine documents.

IV.

Concluding that the Commission had authority to inspect the Skyride and relevant documents, we grant the following relief:

1. The district court's decision denying plaintiffs injunctive relief is AFFIRMED.

2. The declaratory judgment entered in favor of plaintiffs is VACATED.

3. The district court's decision granting plaintiffs' motion to quash the administrative search warrant is REVERSED.

4. The district court's decision denying the Commission's motion for an order to show cause is VACATED, the issue now being moot in the light of this opinion.

AINSWORTH, Circuit Judge, dissenting:

Despite the carefully articulated reasons set forth in the majority opinion which holds that an aerial tramway in an amusement park is within the jurisdiction of the Consumer Product Safety Commission under the Consumer Product Safety Act of 1972, 15 U.S.C. § 2051 *et seq.* (the Act), I continue to believe that the language of the Act itself, interpreted by taking the words as they are commonly and ordinarily understood, as well as the legislative history, dictate the conclusion that the aerial tramway is not a consumer product and not under the Act. Consequently, I dissent.

Whether or not the aerial tramway known as the Skyride is a consumer product, under the jurisdiction of the Act, hinges specifically on the interpretation of the words of Section 2052(a)(1) which defines that term as follows:

> The term "consumer product" means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; but such term does not include—
>
> > (A) any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer ...."

Plaintiffs state (referring to subsection ii) that if each of the four phrases (1) "in or around a permanent or temporary household or residence," (2) "a school," (3) "in recreation," and (4) "or otherwise" provide independent bases of jurisdiction, as the majority now holds, the Act's jurisdiction extends to the entire universe of articles produced for the use or enjoyment of consumers. Thus, under the majority's interpretation, the Act's jurisdiction is virtually limitless in

this context. It is true that "or otherwise" is a broad and all-inclusive term, but the phrase "in recreation, or otherwise" should be construed to modify the preceding words "household or residence, a school." Unless such modification is accepted, there can be no sensible reason for Congress including the home and school use provisions which would be mere surplusage under the majority's interpretation since the "or otherwise" term is without restriction.

The Tenth Circuit analyzed the identical statute in *Robert K. Bell Enterprises, Inc. v. Consumer Product Safety Commission*, 645 F.2d 26, 29 (10th Cir. 1981), and concluded that the term "in recreation, or otherwise" did, indeed, modify the home and school use provisions in subsection ii. In my view, this is a more reasonable and proper construction and I would apply it here.

The legislative history of the Act supports the view that consumer products should be restricted to those used at home or at school. In the section of the House Report entitled Basis for Legislation, the Committee made specific reference to the home or household five times in the space of two and one-half pages. H.R.Rep.No.1153, 92d Cong., 2d Sess. 21-24 (1972). More importantly, the House Report stated, "Within the last six years, the Congress has exhibited an increasing concern with the safety of the products which consumers encounter in their daily lives." In contrast, although many people ride the Skyride each year, it can hardly be said that an aerial tramway at the State Fair of Texas is the type of product which consumers encounter in their daily lives.[1]

I dissent.

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[1] There is no absence of governmental regulation of the State Fair grounds. Safety of the buildings and structure has been provided for since 1941 under the Dallas City Code. *See* Dallas City Code art. 96–1 *et seq.* (1941); Dallas City Code § 32–12 *et seq.* (1961).

APPENDIX C

United States District Court
Central District of California

WALT DISNEY PRODUCTIONS AND
WALT DISNEY WORLD CO.,
Plaintiffs,

v.

UNITED STATES CONSUMER PRODUCT
SAFETY COMMISSION,
Defendant.

No. 79-0170-LEW (Px)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant having filed a motion to dismiss, and defendant and plaintiffs having filed cross motions for summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, oral argument having been heard on April 9, 1979, and the Court having considered the pleadings and prior proceedings in the action as well as the submissions accompanying these motions, the Court hereby makes the following findings of fact and states the following conclusions of law:

FINDINGS OF FACT

1. Plaintiff Walt Disney Productions (hereinafter "Disney") is a corporation organized under the laws of the State

of California and has a principal place of business at Anaheim, Orange County, California. Plaintiff Walt Disney World Co. (hereinafter "Disney World") is a corporation organized under the laws of the State of Delaware and has a principal place of business at Bay Lake, Orange County, Florida.

2. Defendant the United States Consumer Product Safety Commission (hereinafter "the Commission" or "the CPSC") is an agency of the United States.

3. This action arises under the Consumer Product Safety Act [15 U.S.C. §§ 2051 et seq. (1976)] [the "Act"] and jurisdiction exists in this Court pursuant to 28 U.S.C. §§ 1331 and 1337 (1976), the Administrative Procedure Act [5 U.S.C. §§ 701 *et seq.* (1976)], and the Declaratory Judgment Act [28 U.S.C. § 2201 (1976)]. In the action plaintiffs seek a judgment declaring that the Commission's authority under the Consumer Product Safety Act to obtain information from manufacturers, distributors and retailers of "consumer products" and to regulate the sale or distribution of such "consumer products" does not extend to certain theme park installations at plaintiff Disney's "Disneyland" theme park and at plaintiff Disney World's "Disney World" theme park, on the ground that such installations are not "consumer products" within the meaning of that term as defined in the Act.

4. Since 1956 plaintiff Disney has operated at its Disneyland theme park an attraction known as a Skyride. Since 1971 plaintiff Disney World has operated at its Walt Disney World theme park a similar attraction also known as a Skyride.

5. The Skyrides are substantial permanent structures on which passengers are transported in gondola cars along a cable route of approximately 1289 feet (Disneyland) to approximately 1800 feet (Disney World). The structures con-

sist of machine drive systems, cable support towers and other equipment manufactured and sold by Von Roll, Ltd., a Swiss manufacturer, under the name "Von Roll Sky Way," and passenger gondolas, terminal stations, foundation and other ancillary structures which have been procured or constructed by plaintiffs. As originally installed for operation the Disneyland Skyride had a cost of approximately $375,000 and the Disney World Skyride had a cost of approximately $3.5 million.

6. The Skyrides are operated exclusively by trained operators employed by plaintiffs. These operators start the machinery which drives the Skyride prior to the opening of the park; immobilize each gondola by hand at the loading platform; open the gondola door and supervise the entry and seating of passengers; close and lock the gondola door from the outside; guide by hand the movement of the gondola into position for dispatch; ensure by hand that each gondola which is arriving at the opposite terminal station has stopped; and unlock and open each arriving gondola door and assist passengers in disembarking.

7. Passengers on the Skyride perform no activity other than stepping on and off the Skyride, with the assistance of operators. While seated within the gondola, passengers simply ride and observe passively an aerial view of the park. Operators are instructed to refuse entry to any passenger whom they believe will not remain passive during the ride.

8. The Skyride operated at Disneyland is subject to regulation by the State of California under the Aerial Passenger Tramways Act (Cal. Labor Code § 7340 *et seq.* (West 1971 & Supp. 1979)).

9. By letters dated December 5, 1978, the Commission through its Product Defect Correction Division, informed

Disney and Disney World of the formal initiation of an investigation of the aerial tramway systems manufactured by Von Roll, Ltd. of Switzerland and known as the "Von Roll Sky Way," the investigation to include the Disneyland and Disney World Skyrides. Those letters constitute an assertion by the Commission of jurisdiction over plaintiffs' Skyrides.

10. The letters of December 5, 1978, further inform Disney and Disney World of an asserted obligation under the Act and the Commission's regulations to provide the Commission with specified information in connection with the Commission's investigation. These letters state that failure to provide the information required is a prohibited act under the Act, and that civil sanctions and criminal penalties may be imposed on knowing and willful violators of the Act.

11. To the extent that any conclusion of law is deemed a finding of fact, it is to that extent hereby made a finding of fact.

CONCLUSIONS OF LAW

12. This Court has jurisdiction over the parties to this action.

13. This Court has jurisdiction over the subject matter of this action. [5 U.S.C. § 704 (1977), 28 U.S.C. §§ 1331 (1966), *as amended* (Supp. 1978), 28 U.S.C. § 1337 (1976), 28 U.S.C. § 2201 (1959), *as amended* (Supp. 1978)].

14. This action is properly brought in the United States District Court for the Central District of California by virtue of the residence of plaintiff Disney. [28 U.S.C. § 1391(e)(4) (1976)].

15. The action of the Commission in formally initiating an investigation of the Von Roll aerial tramway systems, and in informing plaintiffs of an obligation to provide information

concerning those systems constitutes final agency action reflecting the Commission's own final determination of the scope of its claimed jurisdiction. The final agency action affects substantial interest of the plaintiffs. [5 U.S.C. § 702 (1976)].

16. There is an actual and justifiable controversy between each of the plaintiffs and the Commission which at this time can be fully and appropriately adjudicated by this Court. [28 U.S.C. § 2201 (1976)].

17. No statute bars this declaratory judgment action, and no exclusive means of obtaining review is prescribed by statute. The final action of the Commission is ripe for judicial review at this time. [5 U.S.C. § 701 *et seq.* (1976)].

18. As a matter of law, the plaintiffs are entitled to a judgment declaring that the Von Roll Skyways operated by them at Disneyland and Disney World as "Skyrides" are not "consumer products" within the meaning of that term as defined in the Consumer Product Safety Act. [15 U.S.C. § 2052(a)(1) (1976)].

19. The legislative history of the Consumer Product Safety Act reflects congressional intent to limit its scope to products "capable of production or distribution for sale to an individual." S.Rep.No. 749, 92d Cong., 2d Sess. 12 (1972). Section 2051(a)(2) of the Act expresses congressional concern about the "complexities of consumer products and the diverse nature and abilities of consumers using them." Section 2066(b) authorizes the Commission to obtain "free samples" of any consumer product offered for import into the United States and Section 2076(f) authorizes the Commission to purchase at cost any consumer product it needs to carry out the purposes of the Act.

20. This language from the Act and its history supports an interpretation limiting the term "consumer product" to

products that might customarily be owned and/or operated by consumers. The Skyrides are large, complex, expensive, permanent installations. To speak of obtaining a free sample of a Skyride or of obtaining a Skyride at cost is unrealistic. Yet, while the Act does not require the Commission to obtain samples of every consumer product it investigates, its language does seem to contemplate that it will always be practicable to obtain a sample of a consumer product.

21. At no time is a Skyride controlled by its riders. Rather, at all times the ride is operated by trained park personnel. When a customer at Disneyland or Walt Disney World purchases a ride on a Skyride, he or she purchases only the right to occupy the installation passively. The only "consumer product" purchased is the ticket. The ride apparatus as a whole is not produced "for the personal use, consumption or enjoyment of a consumer" (15 U.S.C. § 2052(a)) so it is not a consumer product.

22. The Consumer Product Safety Commission was created as a specialized agency to guard consumers against risks associated with the products they use, risks that might go unrecognized by the users themselves. Too expansive a reading of the Act's definition of a "consumer product" could result in the Commission spreading its limited resources too thinly, and might rob consumers of the specialized agency expertise that Congress has attempted to guarantee.

23. To the extent that any finding of fact is deemed a conclusion of law, it is to that extent hereby made a conclusion of law.

DATED: April 17, 1979

LAUGHLIN E. WATERS
United States District Judge